10-1994

Section 5: Criminal Law

Institute of Bill of Rights Law, William & Mary Law School

F.B.I. SAYS 12,000 FAULTY REPORTS ON SUSPECTS ARE ISSUED EACH DAY

The New York Times
August 25, 1985, Sunday, Late City Final Edition

By David Burhham, Special to the New York Times

At least 12,000 invalid or inaccurate reports on suspects wanted for arrest are transmitted each day to Federal, state and local law-enforcement, agencies, according to projections by the Federal Bureau of Investigation.

The estimate of faulty reports was based on a continuing series of F.B.I. audits, which have been conducted in a dozen states. The audits also indicated problems with about 7,000 reports transmitted each day concerning stolen vehicles and license plates.

The inaccurate information is provided by thousands of state and local law-enforcement agencies to the bureau's National Crime Information Center. The center was established to give police officers speedy notice of whether a person stopped for a traffic offense is wanted on criminal charges in another jurisidiction or whether a particular car has been reported stolen.

Dangers of System Cited

Law-enforcement and civil liberties experts say that invalid or false information can endanger the safety of individual officers, the ability of the police to control crime and the freedom of citizens. The F.B.I. said that such concerns have led the bureau to push state and local officials for more accurate records and that the audits are another step in that direction.

More than 60,000 state and local agencies provide most of the information to the National Crime Information Center, which is now used by law-enforcement officers nearly 400,000 times a day.

Dozens of specific cases have become known in the last few years in which inaccurate information including faulty warrants and wrong height, weight and date of birth data has contributed to the arrest and detention, sometimes for days, of innocent individuals.

Two years ago, for example, Sheila Jackson Stossier, an Eastern Airlines flight attendant, was wrongfully jailed for almost three days by several Louisiana law-enforcement agencies on the basis of a Houston arrest warrant that had been placed into the national communications network. The warrant was for a suspect with a similar name, however, and officials in Louisiana failed to check Miss Stossier's passport and other identity papers that would have shown she was not the person sought.

F.B.I. rules require computer records to be checked with the original source of the information, but apparently that was not done in the Stossier case.

In addition, the Houston warrant was for a misdemeanor charge and should not have been placed in the F.B.I. system; suspects cannot normally be extradited from one state to another for misdemeanors.

Miss Stossier, as well as individuals in Michigan, California and New Jersey, have filed suits charging that their constitutional rights have been violated by law-enforcement actions prompted by inaccurate or misleading information.

Although the F.B.I. is auditing the communications system that transmits those records, the bureau has not attempted to collect information on the number of people who may have been wrongly arrested or detained based on inaccurate information.

#6 Percent Called Faulty

David Mitchell, the head of the F.B.I.'s new auditing force, said the bureau did not have sufficient data to provide absolute numbers about the percentage of flawed reports being provided by state and local agencies that then were transmitted to other agencies by the F.B.I. He said, however, that the available evidence indicated that on a national basis approximately 6 percent of the 211,296 warrant entries and 4.5 percent of 165,253 stolen vehicle entries being transmitted through the network each day had serious flaws.

Representative Charles E. Schumer, Democrat of Brooklyn, said the faulty records are ''a gaping hole'' in the criminal justice system and has introduced legislation to provide states with Federal funds to improve record keeping. ''The most effective way to improve society's ability to fight

crime and to protect the lives of police officers and the civil liberties of all citizens is to make sure these records are accurate," he said.

The decision of the F.B.I. to make its audits public marks the first time that the agency has acknowledged the extent of the problem of faulty records. In 1983, the Office of Technology Assessment released a study by the National Crime Information Center that included roughly similar findings. At the time, however, F.B.I. officials sharply attacked those findings, saying they were based on poor research.

"Initially, we felt that the accuracy of the information provided by state and local jursidictions was beyond our control other than repeatedly urging them to worry about data quality," Mr. Mitchell of the F.B.I. said. "But several years ago, our advisory board agreed we should do more than to just lead the people to water."

Computer experts say that one of the most persistent and hard to correct problems confronting various businesses and government agencies in the United States today is the poor quality of some of the information contained in giant computer systems that collect taxes, check credit worthiness and store medical records.

Inaccurate information placed in such systems can lead agencies or companies to take inappropriate, harmful and sometimes unconstitutional actions against individuals, the experts say.

Why Problems Persist

Improving the accuracy of computerized information is especially difficult in those cases, including the F.B.I. system, where many different agencies operating under the direction of many different authorities are allowed to enter data into a central computer.

Because of ambiguities of Federal law and the sensitivities of the states, the F.B.I. did not start its auditing program until more than fifteen years after the system first began operating.

The first round of official audits made public by the F.B.I., involving five states, found enormous variation in the validity and accuracy of the warrant and vehicle information, including these examples:

* In a 10-day period in March, 13.2 percent of a sample of reports placed in the F.B.I. system by Alabama agencies were invalid because the underlying warrants had been dismissed or otherwise acted upon. Another 8.7 percent had incorrect information about the height, weight and date of birth of the wanted person. Such information is essential to help police avoid arresting the wrong person. Concerning stolen car reports, 5.8 percent were found to be invalid or inaccurate.

* In Oregon, slightly more than 3 percent of a sample of reports about wanted persons, 11 percent of the reports on missing persons and 2.6 percent of the reports on stolen cars submitted by law-enforcement agencies were found to have various flaws during a check in October of 1984.

* A sample of wanted person entries submitted in September 1984 by agencies in Wisconsin, however, found that each item checked by the F.B.I. was accurate. For stolen cars, 2.5 percent of the reports were invalid or inaccurate.

Audits of reports from Idaho and Wyoming were also released by the F.B.I. Those audits were the first group to have been completed and reviewed by the affected states since the formal auditing program got underway.

Court Records Checked

Mr. Mitchell said that in a typical F.B.I. audit, investigators would sample reports submitted by agencies in a state and check their validity and accuracy against the records maintained by local courts and prosecutors. He said that after the new program had been approved by the network's advisory board in November 1978, several states with what were believed to be very accurate records volunteered for initial experimental audits. These states were Colorado, Florida, Virginia and Pennsylvania.

"So far we've had a lot of cooperation from the states," he said.

In 1984, the F.B.I. audited 12 states. In 1985, the Bureau's audit staff so far has completed six such examinations, has two under way and plans to undertake five more by the end of the year.

The first public acknowledgment of the existence of the audit program came several months ago when F.B.I. Director William H. Webster informed the House Judiciary Subcommittee on Constitutional Rights that the bureau had initiated "an auditing system that is intended to try to identify the quality of performance" of the information being transmitted among the states and to Federal law-enforcment agencies via the bureau's network.

In response to a question from Representative Schumer, Mr. Webster told the subcommittee the auditors had found that the records provided by one city were of such poor quality that the F.B.I. ''wiped out thousands of files'' it had placed in the national system. But when Representative Schumer asked for the name of the city, Mr. Webster turned him down on the grounds that he did not want to single out any single location ''for trouble.''

The F.B.I.'s Alabama audit showed the jurisdiction in that state to which Mr. Webster referred was the Mobile Police Department. The report said that in a special examination of all 453 wanted person reports provided the national system at the time of the audit, 338 entries listed the a height of ''7 feet ll inches, the weight as 499 pounds, the hair as XXX'' and 288 entries listed made-up dates of births like ''01/01/ 10.'' The audit offered no explanation as to why such figures were entered.

Another general problem identified by the F.B.I. in several states was the use of certain kinds of information for improper purposes. Under Federal rules, for example, information about the past arrests of individuals is supposed to be made available only to other law-enforcement agencies. The auditors, however, found that in Alabama and several other states officials were violating national policy by using criminal history information for general licensing purposes.

JUSTICES RULE REPEAT OFFENDERS CAN'T CHALLENGE 'CAREER-CRIMINAL' SENTENCES

The New York Times
May 24, 1994, Tuesday, Late Edition

Linda Greenhouse, Special to The New York Times

In a decision that has implications for the "three strikes and you're out" provision in the crime bill before Congress, the Supreme Court ruled today that Federal defendants who face stiff minimum sentences as repeat offenders cannot ordinarily challenge the validity of the earlier convictions that place them in the "career criminal" category of a 1984 sentencing law.

Defendants have a constitutional right to raise new challenges only to those convictions obtained in violation of the right to counsel, the Court ruled in a 6-to-3 opinion by Chief Justice William H. Rehnquist. Failure to appoint a lawyer for an indigent defendant is a "unique constitutional defect" that should be treated differently from other errors at trial, the majority said.

The dissenting Justices, in an opinion by Justice David H. Souter, said that even defendants who had a lawyer should still be able to challenge the validity of their earlier convictions on other constitutional grounds, like the lawyer's inadequacy or the validity of a guilty plea.

The decision upheld a ruling by a Federal appellate court in Richmond on a question that has divided the lower courts. About half the appeals courts had applied the limit the Court set today. Other courts had permitted somewhat broader challenges to earlier convictions.

Link to Crime Bill

The ruling today addressed only one Federal law, the Armed Career Criminal Act, which provides a mandatory 15-year sentence for a person with three previous convictions who is then convicted of owning or transporting a gun. But the decision's reasoning would also apply to the crime bill now before Congress, which provides for an automatic life sentence upon conviction of a third major Federal crime.

Chief Justice Rehnquist made it clear that Congress was free to provide explicitly for challenges to earlier convictions, as it did in one commonly used narcotics law that imposes longer sentences on multiple offenders. But the Armed Career Criminal Act is silent on the question, as is the "three strikes" provision of the crime bill.

The Chief Justice said that in the absence of a Congressional statement to the contrary, need for "finality" and the interest in "ease of administration" argued for preventing defendants from reopening long-ago convictions at a Federal sentencing hearing.

Such challenges "would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state court transcripts or records that may date from another era, and may come from any one of the 50 states," he said.

Justice Souter disputed this analysis in his dissenting opinion. "It would not be sentencing courts that would have to do this rummaging," he said, "but defendants seeking to avoid enhancement, for no one disagrees that the burden of showing the invalidity of prior convictions would rest on the defendants."

Justice Souter said there was no reason to address the constitutional question in this case because the Armed Career Criminal Act, in his view, implicitly permitted challenges to prior convictions.

SUPREME COURT DEFINES 'DELIBERATE INDIFFERENCE'

New York Law Journal
July 19, 1994, Tuesday

Martin A. Schwartz

AT LONG LAST the United States Supreme Court has provided a definition of the deliberate indifference standard employed in Eighth Amendment prison-condition cases. In Farmer v. Brennan,[1] the Court ruled that the Eighth Amendment claim of a transsexual prisoner, who had been beaten and raped by an inmate, was governed by the deliberate indifference standard. The Court went on to hold that liability could be imposed on a prison official for the deliberately indifferent denial of "humane conditions of confinement" only if it is shown that: "the official knows of and disregards an excessive risk of inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[2]

Justice David Souter wrote the unanimous decision for the Court. Justice Blackmun, Stevens and Thomas each wrote a separate concurring opinion.

Deliberate indifference first appeared in the Supreme Court's decisional law in 1976 in Estelle v. Gamble[3] as the governing standard for prisoner Eighth Amendment medical treatment claims.[4] In Wilson v. Seiter[5] the Court in 1991 extended Estelle by adopting the deliberate indifference standard for all Eighth Amendment attacks on prison conditions.[6] In addition, the Court in City of Canton v. Harris[7] in 1989 ruled that deliberate indifference is the controlling standard for §1983 municipal liability claims based upon inadequate training.[8] Nevertheless, although deliberate indifference has governed a large and expanding universe of prisoners' rights and other claims brought under §1983,[9] the Supreme Court prior to Farmer "never paused to define the meaning of the term deliberate indifference.' . . ."[10]

The plaintiff, Dee Farmer, "who is serving a federal sentence for credit card fraud, has been diagnosed by medical personnel as a transsexual . . ."[11] Farmer has a feminine appearance. Federal prison authorities follow a practice of incarcerating preoperative transsexuals like Farmer with prisoners of the same biological sex.[12] In 1989 Farmer was transferred for disciplinary reasons from a federal correctional institute in Wisconsin to the federal penitentiary in Terre Haute, Ind. * Farmer alleged that shortly after the transfer she was beaten and raped in her cell by another inmate.[13]

Knowledge of Violent Environment'

Farmer's federal court complaint asserted an Eighth Amendment Bivens[14] claim against various federal prison officials. She alleged that defendants transferred her to the Terre Haute penitentiary or placed "her in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that . . . as a transsexual who projects feminine characteristics' [Farmer] would be particularly vulnerable to sexual attack by . . . Terre Haute inmates. This allegedly amounted to a deliberately indifferent failure to protect [Farmer's] safety and thus a violation of [her] Eighth Amendment rights."[15]

The district court granted summary judgment to the defendants, finding that they were not deliberately indifferent because they had no actual knowledge of the potential danger to Farmer.[16] The Seventh Circuit "summarily affirmed without opinion.[17] The Seventh Circuit in prior decisions had ruled that deliberate indifference requires a "subjective standard of recklessness" requiring the plaintiff to show that the prison officials had actual knowledge of the threatened injury.[18] By contrast, the Third and Ninth circuits had ruled "that a prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate.[19] The Supreme Court granted certiorari to resolve the conflict.

But before tackling the definition of deliberate indifference, it first had to be determined whether prison officials may be held liable under the Eighth Amendment for their deliberate indifference to inmate safety. The Constitution generally does not impose affirmative obligations upon government to assist individuals in need, even if the government knows that an individual is threatened with harm.[20] However, since the state has deprived prisoners of their physical liberty and of the means to protect themselves, prison officials have an Eighth Amendment obligation to provide inmates with the necessities of life -- "adequate food, clothing, shelter and medical care, and must take reasonable measures

to guarantee the safety of the inmates.'"[21] This includes the duty to protect prisoners from being assaulted by other inmates.

Although this has been the position of the lower federal courts and "assumed" in Supreme Court decisional law,[22] Farmer marks the first time the Court has actually held that the Eighth Amendment imposes an affirmative duty to protect inmates from being assaulted by other inmates. Although prison violence is unfortunately rampant,[23] "gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological [objective]'" and is simply not part of the criminal offender's punishment.[24]

Condition of Confinement

The Court in Farmer next resolved that in cases arising out of an assault upon an inmate by another inmate, deliberate indifference is in fact the proper constitutional standard. Prisoners who allege excessive force by prison guards must under the Eighth Amendment demonstrate that force was applied "maliciously and sadistically for the very purpose of causing harm.[25] This rigorous standard was imposed because prison officials frequently must make split second decisions to employ force in tense, rapidly evolving situations. The right to be free from assault by other inmates, however, is a "condition of confinement," and Wilson v. Seiter[26] resolved that deliberate indifference is the governing standard under the Eighth Amendment for prison condition claims.

Wilson identified two requirements that prisoners have to satisfy in order to prevail on a condition of confinement claim. First, it is necessary to show that from an objective viewpoint the prisoner suffered a sufficiently serious deprivation. Additionally, it must be shown that the official had a culpable state of mind, meaning that the official was deliberately indifferent to the inmate's healthy or safety.

However, as the Court in Farmer acknowledged, it had never before "paused" to explain the meaning of "deliberate indifference." This is truly amazing given the myriad contexts in which the Supreme Court and the lower federal courts have employed the deliberate indifference standard. If we expect first-year law school students to define their terms, should not the Supreme Court "pause" and do the same?

Nor can it be said that the Supreme Court failed to define deliberate indifference because its meaning is obvious. Far from it. It is unclear whether literally an individual can be both deliberate and indifferent at the same time. As the Seventh Circuit observed, this "seeming oxymoron" has given the courts fits: "How do we honor both the "deliberate" and "indifferent" aspects?[27]

The Farmer Court said that deliberate indifference lies somewhere between negligent conduct and conduct engaged in "for the very purpose of causing harm or with the knowledge that harm will result.[28] Deliberate indifference is fairly equivalent to recklessness: "acting or failing to act with deliberate indifference to a substantial risk of serious harm . . . is the equivalent of recklessly disregarding that risk.[29]

Awareness of Risk

Although, as it turned out, equating deliberate indifference with recklessness helped to narrow the issue, it was not a cure-all because the term reckless also "is not self defining."[30] Plaintiff urged that deliberate indifference should be defined by reference to civil law recklessness under which a person is subject to liability if she acted or failed to act "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.[31] The defendants urged the adoption of criminal law recklessness that requires a finding that the defendant "[disregarded] a risk of harm of which he is aware.[32] The different in these two definitions is reflected in the split in the circuits in defining deliberate indifference.

The Supreme Court in Farmer adopted the defendants' argument that deliberate indifference under the Eighth Amendment requires a showing that the official had actual knowledge of the risk of harm. The official must (1) be actually "aware of facts from which an inference could be drawn that a substantial risk of harm exists"; (2) actually draw the inference; but (3) nevertheless disregard the risk to the inmate's health or safety.[33]

In adopting the actual knowledge requirement, the Court stressed that the Eighth Amendment does not prohibit cruel and unusual conditions but only cruel and unusual punishments. An official's failure to remedy a risk of harm that he should have known about, but of which he had no actual knowledge, cannot be considered punishment. And, a purely objective definition of deliberate indifference is inconsistent with the subjective prong established inWilson v. Seiter.

City of Canton v. Harris[34] did not call for a different result. There, it will be recalled, the Court adopted the deliberate indifference standard for §1983 muncipal liability claims based upon inadequate training. In doing so, the Court said that

there may be situations in which "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers [were] deliberately indifferent to the need.[35] This is an objective test pursuant to which municipal liability may attach when the policymakers have actual or constructive notice of the need to train.[36] The Farmer Court, however, found that because City of Canton involved an interpretation of §1983, it did not govern the Eighth Amendment issue.

Putting Farmer and City of Canton together, then, results in two different meanings of deliberate indifference. For purposes of §1983 municipal liability training claims, an objective "obviousness" definition controls; for Eighth Amendment prison condition cases, a subjective actual knowledge test governs. Prison officials thus cannot be held liable under the Eighth Amendment based on a showing that the risk was so obvious that a "reasonable official would have noticed it."[37]

The actual knowledge test adopted in Farmer does not require a showing that the official believed that an inmate would be harmed. Nor is the plaintiff's failure to warn prison officials dispositive. And, a prison official cannot escape liability because he did not know that the plaintiff was likely to be assaulted "by the specific inmate who eventually committed the assault."[38]

Justice Souter stressed that whether the official had actual knowledge of a substantial risk of harm is a question of fact. Moreover, this knowledge may be inferred from "any relevant evidence,[39] including the obviousness of the risk as, for example, where rape and other assaults upon inmates is pervasive. Thus, from evidence that the official should have known about the risk, the trier may, though need not, infer that he did know about it.[40] On the other hand, prison officials may avoid liability by showing (1) that they did not know about the facts creating the danger, or, (2) that while they knew of the facts, they mistakenly believed that there was no substantial risk of harm, or, (3) that they knew about the risk and responded reasonably to it.

The concurring opinions of Justices Harry Blackmun and John Paul Stevens expressed their continued disagreement with Wilson v. Seiter's establishment of the subjective prong for Eighth Amendment prison condition cases. In their view, the focus should be on the harm to the prisoner, not what the official intended. Justice Clarence Thomas' concurring opinion reiterates his position that the Eighth Amendment was intended to reach only the criminal sentence, not prison conditions. He stated sarcastically that in its "attempt to rectify . . . unfortunate [prison] conditions, the Court further refines the "National Code of Prison Regulations," otherwise known as the Cruel and Unusual PUnishment Clause.[41] Most notably, Justice Antonin Scalia did not join him this time.

To recapitulate, when Farmer is read together with prior Supreme Court decisional law, the following emerges:

1. Although claims that prison guards used excessive force are governed by the "maliciously and sadistically for the purpose of causing harm" standard, deliberate indifference governs prisoner claims arising from assaults by other inmates.

2. Although deliberate indifference for §1983 municipal liability training claims is defined by reference to an objective "obviousness" -- actual or constructive notice -- standard, for Eighth Amendment prison condition (including inmate assault) cases, deliberate indifference is defined by reference to an actual knowledge standard.

3. To be liable under the Eighth Amendment a prison official must have (a) known the facts from which an inference of substantial risk of harm exists, (b) actually drawn the inference, but (c) failed to take reasonable steps to alleviate the risk.

4. The official's actual knowledge, however, may be inferred from any relevant evidence, including the obviousness of the risk of harm.

Martin A. Schwartz is a professor at the Touro College Jacob D. Fuchsberg Law Center. He is co-author, with John Kirklin, of Section 1983 Litigation: Claims, Defenses and Fees, Second Edition (John Wiley and Sons, 1991).

ENDNOTES

1. 1994 WL 237595 (U.S. June 6, 1994).

2. Id. at *7.

3. 429 U.S. 97 (1976).

4. Id. at 104. ("deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment"). See Farmer v. Brennan, supra note 1 at *6 (deliberate indifference first appeared in United States Reports in Estelle).

5. 111 S.Ct. 2321 (1991). See also Helling v. McKinney, 113 S.Ct. 2475, 2481-82 (1993) (claim contesting exposure to secondary tobacco smoke).

6. The lower federal courts have applied the deliberate indifference standard to other prisoner claims as well,

including prison suicide claims and attacks upon inmates by fellow inmates. See 1 Schwartz & Kirklin, Section 1983 LItigation: Claims, Defenses, and Fees, §3.9A (1994 Cum. Supp. No. 2).

7. 489 U.S. 378 (1989).

8. The lower courts have logically applied City of Canton to §1983 municipal liability claims based upon inadequate supervision. Schwartz and Kirklin supra note 6 at §7.10.

9. See note 6, supra.

10. Farmer v. Brennan, 1993 WL 237595 "6" (1994).

11. Id. at "3. A transsexual is a person with a "rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change." Farmer v. Brennan, at *3, quoting American Medical Association Encyclopedia of Medicine 1006 (1989).

12. Farmer at *3.

13. "[Penitentiaries] are typically higher security facilities than federal correctional institutes." Id. at 4.

14. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) (recognizing claim for damages directly under Fourth Amendment). See also Carlson v. Green, 446 U.S. 14 (1980) (recognizing claim for damages under Eighth Amendment).

15. Farmer at *4.

16. Id. at *5 (describing district court's unreported opinion).

17. Id.

18. McGill v. Duckworth, 944 F2d 344, 348 (7th Cir. 1991), rt. denied 112 S.Ct. 1265 (1992). See also Pacelli v. DeVito, 972 871 (7th Cir. 1992).

19. Young v. Quinlan, 960 F2d 351, 360-61 (3d Cir. 1992) (emphasis in original); Redman v. County of San Diego, 942 F2d 1435 (9th Cir. 1991) (en banc), rt. denied 112 S.Ct. 972 (1992).

20. Deshaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). See also, Collins v. Harker Heights 112 S.Ct. 1061 (1992).

21. Farmer, at *5, quoting Hudson v. Palmer 468 U.S. 517, 526-27 (1984).

22. Id. at *5.

23. Id at *18 fn (Blackmun J., concurring); C. Mandell, "Prisoner Assault: How Much Must Prison Officials Know to Be Liable for Filing to Keep a Prisoner Safe From Attack," in Preview p. 142 (Jan. 3, 1994).

24. Id. at *5, quoting from Hudson v. Palmer, supra note 21 at 548 (bracket supplied in Farmer).

25. Hudson v. McMillian, 112 S.Ct. 995 (1992); Whitley v. Albers, 475 U.S. 312 (1986).

26. 111 S.Ct. 2321 (1991).

27. McGill v. Duckworth, 944 F2d supra note 18 at 351.

28. Farmer, at *6.

29. Id. at *7.

30. Id.

31. Id. (emphasis added).

32. Id. (emphasis added).

33. Id.

34. 489 U.S. 378 (1989).

35. Id. at 390.

36. Id. at 396 (O'Connor J., concurring in part and dissenting in part), discussed in Farmer v. Brennan at *9. The Court in Farmer observed that there is "considerable conceptual difficulty" in determining the subjective state of mind of a governmental entity. Id.

37. Farmer v. Brennan, at *9.

38. Id.

39. Id. at 12.

40. "While the obviousness of a risk is not conclusive and a prison official may show that the obviousness escaped him, . . . he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist " Farmer v. Brennan at *14 fn. 8.

41. Farmer v. Brennan at *19 (Thomas, J. dissenting).

DEATH ROW'S LAWYER-LESS GET HELP FROM JUSTICES
Prisoners' Right To Counsel For Appeals Upheld

The Washington Post
July 1, 1994, Friday, Final Edition

Joan Biskupic, Washington Post Staff Writer

By one vote, the Supreme Court ruled yesterday that federal judges can stop the scheduled execution of a state prisoner to give the prisoner time to obtain a lawyer and challenge the constitutionality of the sentence.

The 5 to 4 decision, in the case of a Texas inmate who came within minutes of execution last year, undercuts efforts in some states to schedule executions for inmates who have been unable to adequately appeal their cases for lack of a lawyer.

The opinion was written by retiring Justice Harry A. Blackmun, whose last day on the bench was yesterday as the court ended its 1993-94 term. After almost two decades of support for capital punishment, Blackmun declared in February that he believed the death penalty is unconstitutional and vowed never again to send a prisoner to death. Yesterday, he stressed the importance of "promoting fundamental fairness in the imposition of the death penalty."

Mandy Welch, who had argued the case on behalf of convicted murderer Frank McFarland, said the ruling was an acknowledgment that condemned inmates have trouble finding competent lawyers to file formal papers.

But Texas Attorney General Dan Morales said the court's action will enable death row prisoners to continue stalling their jury-imposed sentences. "This decision could add another year to the 10-year average that recent capital murderers spend in the appellate process," Morales said.

At issue are prisoners' efforts to get lawyers to help them prepare federal "habeas corpus" petitions. Latin for "you have the body," a habeas writ is used by a court to determine whether a prisoner was constitutionally sentenced and lawfully imprisoned.

Federal law does give condemned state prisoners the right to a court-appointed, federally paid lawyer for habeas corpus petition. But lawyers in this complicated and typically thankless field are hard to find. Texas particularly has struggled with a shortage of lawyers. Welch, of the Texas Resource Center, said about 60 of some 370 condemned prisoners there currently lack representation.

At issue was whether federal judges can intervene and grant a stay of execution for an inmate who has not filed a petition for federal court review, in part because no lawyer is available to file the petition.

Texas officials had argued that because McFarland had no habeas petition pending in a federal court, a federal judge had no power to stay his execution or to appoint a lawyer. The state contended that a prisoner should not be entitled to stop an execution unless the prisoner raises "a substantial showing of" a constitutional violation in formal papers.

Welch said a prisoner cannot sufficiently allege any constitutional violation without the help of a lawyer.

A federal trial judge denied McFarland's request for a lawyer, shortly before his scheduled execution, on the ground that no federal appeal actually was pending. A federal appeals court agreed that federal courts lack authority to intervene.

Less than an hour before he was to die last Oct. 26, the Supreme Court stayed the execution. Soon after, it agreed to hear his quandary.

Blackmun acknowledged that federal courts cannot stop state proceedings unless federal law expressly authorizes it. But he concluded that once a condemned prisoner even asks for a lawyer, which is explicitly allowed under federal law, the federal court can stay a scheduled execution.

If a court were able only to appoint a lawyer, "this appointment would have been meaningless unless McFarland's execution also was stayed," he said.

Joining Blackmun in McFarland v. Scott were Justices John Paul Stevens, Anthony M. Kennedy, David H. Souter and Ruth Bader Ginsburg. Dissenting were Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Clarence Thomas and Antonin Scalia.

COURT: TELL JURIES WHEN 'LIFE' MEANS NO PAROLE

THE RULING CASTS DOUBT ON SOME DEATH SENTENCES IN PA., S.C. AND VA. IT FURTHER PROTECTS INMATES

Philadelphia Inquirer
Saturday June 18, 1994
Final Edition; National Section; Page A03

Aaron Epstein, Inquirer Washington Bureau

Expanding the concept of truth in sentencing, the Supreme Court ruled yesterday that defense lawyers seeking to prevent a death penalty generally have a right to inform the jury when the alternative of "life imprisonment" really means no parole.

The 7-2 ruling casts doubt on the constitutionality of some death sentences in three states - Pennsylvania, South Carolina and Virginia - and is expected to provoke new legal challenges to death penalties in Texas, which leads all states in death-row population. In reversing a death sentence in a South Carolina murder case, the justices added another constitutional protection to a long list of safeguards against imposing the death penalty unfairly.

That development led the dissenters - Antonin Scalia and Clarence Thomas to observe with dismay: "The heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerrilla war to make this unquestionably constitutional sentence a practical impossibility." The new safeguard amounts to this:

Whenever life imprisonment without parole is the only alternative to a death penalty, and the prosecutor argues that a convicted murderer is so dangerous to society that he must be executed, the defense lawyer must be allowed to inform the jury that the defendant is not eligible for parole.

Justice David H. Souter argued that the trial judge be required to convey the truth to the jury, but failed to muster a majority.

Based on the new constitutional requirement, the justices ordered a new sentencing trial for Jonathan Dale Simmons, who beat and sexually assaulted three elderly women - including his grandmother - and then beat a fourth to death in her home in Columbia, S.C., in 1990.

Under South Carolina law, Simmons was ineligible for parole. But neither his lawyer nor the judge was allowed to inform the jury of that fact.

The prosecutor argued that Simmons would remain a threat to society if not put to death. The defense lawyer replied that Simmons' future dangerousness was limited to elderly women, so there was no reason to expect him to be violent in prison.

While deliberating, the jury sent a note to the judge inquiring: "Does the imposition of a life sentence carry with it the possibility of parole?" Replied the judge: "You are instructed not to consider parole or parole eligibility in reaching your verdict. . . . The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning." Twenty-five minutes later, the jury condemned Simmons to death.

A Supreme Court majority concluded yesterday that the jury's inability to get a straight answer violated Simmons' constitutional right to due process of law.

Simmons' death sentence could have been founded on the jury's belief that he was eligible for parole and would be dangerous to society if not executed, wrote Justice Harry A. Blackmun, the high court's only death-penalty opponent.

Most of the 26 states that provide for imprisonment without release as an alternative to execution require that juries be informed that a defendant is ineligible for parole. But three states - Pennsylvania, South Carolina and Virginia - refuse to inform juries of that fact. There are 170 death-row prisoners in Pennsylvania, 55 in South Carolina and 46 in Virginia.

Richard Dieter, executive director of the Death Penalty Information Center, which opposes capital punishment, said "the next battleground" would be in Texas, where 386 of the nation's 2,848 Death Row inmates reside. Texas does not have a life-without-parole alternative to capital punishment. But it prevents juries from learning that life imprisonment means a dangerous defendant cannot be released on parole for at least 40 years. Defense lawyers expect to argue that the reasoning of the Simmons case should cover severely limited parole in Texas.

NOTHING PERFUNCTORY IN THIS REVIEW

The Phoenix Gazette
June 6, 1994 Monday, Final

Local news reports rather perfunctorily noted that the U.S. Supreme Court has now agreed to hear the case of Arizona v. Evans. But there is nothing perfunctory about what the court did in this case.

First, some background:

According to appellate court records, on Dec. 13, 1990, a Phoenix justice of the peace issued a misdemeanor warrant for the arrest of Isaac Evans after he failed to appear for several traffic violations. But six days later, Mr. Evans did appear before a judge pro tempore and the judge quashed the warrant. There was no indication in Mr. Evans' justice court file, however, that, in keeping with standard procedure, a justice court clerk called the Sheriff's Office to notify them of the quashed warrant. Neither are there records in the Sheriff's Office indicating that a telephone call was made with information that the Evans arrest warrant had been quashed.

Subsequently, Officer Bryan Sargent stopped Mr. Evans for driving the wrong way on a one-way street on Jan. 5, 1991, and asked him for his driver's license. Mr. Evans said he did not have a license, because it had been suspended, and after conducting a records search, Officer Sargent found that the license had in fact been suspended - and that there was a valid misdemeanor warrant for Mr. Evans' arrest.

While making the arrest, Officer Sargent had difficulty handcuffing Mr. Evans. He asked him to relax one of his hands. When Mr. Evans did, he dropped a marijuana cigarette. Officer Sargent and another officer then searched the passenger compartment of the car and found a bag of marijuana under the passenger seat. The officers also found a package of cigarettes, rolling papers, and marijuana residue in the purse of a passenger in the Evans car.

On Jan. 8, 1991, prosecutors filed a complaint against Mr. Evans, charging him with possession of marijuana, a Class 6 felony. He responded by seeking to suppress all evidence seized from him that Jan. 5, and Judge I. Sylvan Brown of Maricopa County Superior Court agreed that the marijuana could not be used as evidence against him.

Prosecutors appealed and the Arizona Court of Appeals reversed Judge Brown's ruling, arguing the marijuana was, in fact, admissible evidence. Mr. Evans then appealed and the Arizona Supreme Court, in an opinion written by Justice Thomas A. Zlaket earlier this year, invoked the exclusionary rule, which prohibits the use of evidence produced through illegal police conduct.

"This warrantless arrest, based entirely as it was on an erroneous computer entry, was plainly illegal," Justice Zlaket wrote. "The fact that the arresting officer acted in good faith is irrelevant."

In a lone, eloquent dissent, Justice Frederick J. Martone said he, too, was "concerned with the loss of 'human liberty.' But the exclusionary rule will not restore liberty to the innocent and should not restore it to the guilty."

Justice Martone said, "the court assumes that the exclusionary rule applies to all unlawful searches. It does not. The exclusionary rule is a 'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' "

Then he added, "Not even the court suggests that the police officer could have done anything other than arrest the defendant. It would have been misfeasance to ignore the warrant."

The purposeless application of the exclusionary rule, he argued, defeats the truth-finding process, frees the guilty, and generates disrespect for the law and the administration of justice with no offsetting benefits.

Indeed, it seems to have been Justice Martone's singular argument, his singular vote, upon which the U.S. Supreme Court built its decision to hear the case and render a ruling some time before July 1, 1995.

Inasmuch as the Supreme Court annually receives approximately 7,000 petitions to review particular cases - but grants only 100 of them - and inasmuch as the court is unlikely to have granted a review just to affirm the Arizona Supreme Court's unfortunate finding, Arizona v. Evans seems to be anything but perfunctory.

Reprinted with permission.

GUNS AND COMMERCE AND COURTS

The Washington Times
April 24, 1994, Sunday, Final Edition

With the agreement of the U.S. Supreme Court to consider an appeal of a lower federal court ruling on the constitutionality of a congressional gun control law, the country may be approaching the moment of truth - or at least the moment of determining opinion - on the little matter of whether gun control is constitutional at all. Historically, the court has not ruled very clearly on the issue. Now, the Court may be about to point in a definite direction.

The case the Court has agreed to hear is that of United States v. Lopez, which grows out of a 1990 federal law banning the possession of firearms within 1,000 feet of a school. Lopez was arrested carrying a handgun within that radius and sentenced to a six-month prison term in Texas.

The constitutional issue in the case so far has less to do with the Second Amendment, which confers a constitutional right to keep and bear arms, than it does with the Constitution's commerce clause, which gives Congress the authority to regulate interstate commerce. The federal court ruling of Judge William L. Garwood of the Fifth Circuit that found the "Gun Free School Zones Act" unconstitutional held that Congress failed to specify adequately in the law that it intended to rely on the commerce clause to pass the law at all.

The commerce clause, of course, is a constitutional bog into which wholearmies of laws have vanished. Since the Constitution forbids Congress from exercising powers not explicitly granted to it, only by invoking and expanding the commerce clause have proponents of vastly expanded federal power discovered the authority to do what they want. In general, courts have upheld this use of the clause, with the result that Congress now tends to feel that it can do just about anything it pleases, regardless of constitutional limits on its authority. The Gun Free School Zones Act is an example, whereby the national legislature takes it upon itself to outlaw what private citizens may do with legally owned property in jurisdictions under state and local control.

As Judge Garwood describes it, "The Gun Free School Zones Act extends to criminalize any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a country road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session."

There you have it. It is essential that we find ways to keep guns out of the nation's schools, but as with so many other laws passed by Congress, the Gun Free School Zones Act is pretty much feel-good eyewash, designed to make voters think Congress is doing something about school violence, yet it is drawn so broadly and carelessly that it is both useless for that purpose and dangerous to real civil liberties to boot.

Unlike most laws passed under the commerce clause, this law has absolutely nothing to do with commerce, let alone interstate commerce. This law forbids possession of a firearm - not sale or purchase of one - in certain areas, and it would seem logical that by passing such a law regulating possession, Congress is implying something about the right of citizens to "keep and bear arms." What it is implying is that there is no such right, or at least that Congress has authority to restrict it. In other words, we are really talking about the Second Amendment, and if the Gun Free School Zones Act is upheld as constitutional, then Congress has the authority to restrict the right to keep and bear arms.

That, it can be and has been argued, is dubious on any serious reading of the plain language of the Second Amendment, on the original intent of the Framers and on any common sense understanding of the legal and cultural status of guns throughout American history.

Reprinted from The Washington Times.

93-1660 ARIZONA v. EVANS

Exclusionary rule—Search and seizure—Arrest based on erroneous computer record—Good-faith exception.

Ruling below (Ariz SupCt, 866 P.2d 869, 62 LW 2456, 54 CrL 1373):

Fourth Amendment exclusionary rule applies to evidence obtained during search incident to arrest based on erroneous computer record that did not reflect that warrant for arrest of defendant had been quashed; even assuming that error in computer record was fault of court rather than police, good-faith exception to exclusionary rule, announced in *U.S. v. Leon*, 468 U.S. 897 (1984), does not apply to situation in which no warrant existed at all.

Question presented: In case in which evidence has been seized incident to arrest based upon police computer record of open warrant that had actually been quashed 17 days earlier, does exclusionary rule require suppression of evidence regardless of whether police personnel or court personnel were responsible for quashed warrant's continued presence in police computer record?

Petition for certiorari filed 4/13/94, by Richard M. Romley, Cty. Atty. for Maricopa Cty., Ariz., and Gerald R. Grant, Chief of Appeals Bureau.

STATE OF ARIZONA, Appellant, v. ISAAC EVANS, Appellee.

Supreme Court No. CR-92-0228-PR

SUPREME COURT OF ARIZONA

177 Ariz. 201; 866 P.2d 869; 1994 Ariz. LEXIS 8; 156 Ariz. Adv. Rep. 40

January 13, 1994, Filed

PRIOR HISTORY: Court of Appeals No. 1 CA-CR 91-663. Maricopa County No. CR-91-00513. Appeal from the Superior Court of Maricopa County. The Honorable I. Sylvan Brown, Judge. Opinion of the Court of Appeals, Division One. 172 Ariz. 314, 836 P.2d 1024 (Ct. App. 1992). Vacated

DISPOSITION: AFFIRMED.

COUNSEL: Richard M. Romley, Maricopa County Attorney, by Gerald R. Grant, Deputy County Attorney, Phoenix, Attorneys for Appellant State of Arizona.

Dean W. Trebesch, Maricopa County Public Defender, by James H. Kemper, Deputy Public Defender, Phoenix, Attorneys for Appellee Evans.

JUDGES: ZLAKET, FELDMAN, MOELLER, CORCORAN, MARTONE

JUSTICE THOMAS A. ZLAKET

The court of appeals, with one judge dissenting, held that the trial court abused its discretion in granting defendant's motion to suppress. State v. Evans, 172 Ariz. 314, 836 P.2d 1024 (Ct. App. 1992). We disagree and vacate the appellate court's opinion.

Defendant was stopped for a traffic violation on January 5, 1991. At the time, he had a suspended driver's license. Neither of these offenses, however, precipitated his eventual arrest. The police officer testified at the suppression hearing that he would not have placed defendant under arrest if a computerized records check had not indicated the existence of an outstanding misdemeanor arrest warrant in his name.

While making the arrest, the officer found part of a marijuana cigarette on defendant's person. A subsequent search of his vehicle revealed a bag of marijuana hidden under the passenger seat. Defendant was charged with possession, a class 6 felony.

The computerized record was in error. In fact, the arrest warrant had been quashed by the issuing justice court several weeks earlier. For some reason, it was not expunged from the computer. At the suppression hearing, there was conflicting evidence concerning whether this mistake was caused by the court staff or law enforcement employees. The trial court apparently concluded that it made little difference who was at fault. Relying on State v. Greene, 162 Ariz. 383, 783 P.2d 829 (Ct. App. 1989), which applied the exclusionary rule where police personnel were negligent in maintaining computer records, the judge granted defendant's motion to suppress the evidence seized during the arrest. Thereafter, the state dismissed the charges without prejudice and brought this appeal.

The court of appeals ruled that the evidence should not have been suppressed. The majority concluded that Greene did not apply because the mistake here, more probably than not, was made by justice court employees instead of law enforcement personnel. The appeals court relied primarily on Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974) and United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) in holding that "the exclusionary rule is intended to deter police misconduct and not to punish errors of judges and magistrates," and therefore should not have been utilized in this case. 172 Ariz. at 317, 836 P.2d at 1027.[1]

We do not agree that the trial court abused its discretion under the facts presented. We are unable to follow the lead of the court of appeals in dismissing conflicting inferences raised by evidence on the issue of whether fault rested with the justice court, the police, or both. See id. at 316 n.1, 836 P.2d at 1026 n.1. Testimony at the suppression hearing failed to clearly establish whether a telephone call from the court to the police, advising

that the warrant had been quashed, was made but not entered in the record, or was never made at all. The trial judge was concerned about this gap in the proof, as evidenced by his questions during the hearing. He ultimately made no express finding with respect to responsibility for the error, apparently concluding that it did not matter. But even assuming, as did the appellate court majority, that responsibility for the error rested with the justice court, it does not follow that the exclusionary rule should be inapplicable to these facts.

Tucker is of little value here. In that case, the court was dealing with alleged violations of the 5th, 6th and 14th amendments arising from the failure of police to have given "Miranda warnings" as part of an interrogation that antedated the decision in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Leon is also not helpful. There, officers obtained evidence on the basis of a facially valid search warrant issued by a neutral magistrate. The warrant was later held invalid because it had been issued on an insufficient showing of probable cause. Such a situation is distinguishable from one like this, where no warrant at all was in existence at the time of the arrest. See State v. Peterson, 171 Ariz. 333, 830 P.2d 854 (Ct. App. 1991), cert. denied, 121 L. Ed. 2d 373, 113 S. Ct. 465 (1992); see also 1 Wayne R. LaFave, Search and Seizure § 1.3(g) at 77 (1986). This warrantless arrest, based entirely as it was on an erroneous computer entry, was plainly illegal.

The state argues that the police could have arrested defendant for various traffic violations, and this inevitably would have resulted in the discovery of the contraband. The record clearly establishes, however, that no arrest would have occurred in the absence of the flawed computer record. At most, defendant would have received a traffic citation.

The "good faith" analysis advanced by the state is of questionable application here. This case is not about the motives of the police. The fact that the arresting officer acted in good faith is irrelevant. 2 Wayne R. LaFave, Search and Seizure § 3.5(d) at 24 (1986); see also People v. Fields, 785 P.2d 611 (Colo. 1990). The arrest was not the result of "a reasonable judgmental error" concerning facts which might constitute probable cause. A.R.S. § 13-3925(C)(1). It was the result of negligent record keeping. Whether the erroneous computer record was the fault of police or justice court personnel should be of no consequence even though, as we have noted, evidence on this point was by no means as clear as the state now suggests.

This is also not a case involving a mere "technical violation." A.R.S. § 13-3925(C)(2). Defendant was arrested on the basis of a nonexistent warrant, not one that was "later invalidated due to a good faith mistake." Id. See also United States v. Whiting, 781 F.2d 692 (9th Cir. 1986) (summarily rejecting extension of Leon's good faith exception to warrantless searches).

We cannot support the distinction drawn by the court of appeals and the dissent between clerical errors committed by law enforcement personnel and similar mistakes by court employees. We are concerned here with the performance of purely ministerial functions, not the exercise of judicial discretion. While it may be inappropriate to invoke the exclusionary rule where a magistrate has issued a facially valid warrant (a discretionary judicial function) based on an erroneous evaluation of the facts, the law, or both, Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), it is useful and proper to do so where negligent record keeping (a purely clerical function) results in an unlawful arrest. Such an application will hopefully serve to improve the efficiency of those who keep records in our criminal justice system.

The dissent laments the "high costs" of the exclusionary rule, and suggests that its application here is "purposeless" and provides "no offsetting benefits." Such an assertion ignores the fact that arrest warrants result in a denial of human liberty, and are therefore among the most important of legal documents. It is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness. As automation increasingly invades modern life, the potential for Orwellian mischief grows. Under such circumstances, the exclusionary rule is a "cost" we cannot afford to be without.[2]

Even assuming that deterrence is the principal reason for application of the exclusionary rule, we disagree with the court of appeals that such a purpose would not be served where carelessness by a court clerk results in an unlawful arrest. It also seems to us an anomalous rule, indeed, that would prohibit the use of evidence illegally seized pursuant to the clerical error of a police department clerk, but would permit it if the same mistake was made instead by a court clerk.

We hold that the trial judge did not abuse his discretion, and we vacate the court of appeals' opinion.

THOMAS A. ZLAKET, Justice

CONCURRING: STANLEY G. FELDMAN, Chief Justice; JAMES MOELLER, Vice Chief Justice; ROBERT J. CORCORAN, Justice

MARTONE, Justice, dissenting.

The court concludes that "whether the erroneous computer record was the fault of police or justice court personnel should be of no consequence . . . ." Ante, at 5. Thus today the court holds that the exclusionary rule serves to deter judicial error as well as police misconduct. This proposition is directly contrary to United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Because I cannot agree with the court's expansion of the exclusionary rule, I dissent.

The court assumes that the exclusionary rule applies to all unlawful searches. It does not. The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613, 620, 38 L. Ed. 2d 561 (1972). Its application "has been restricted to those areas where its remedial objectives are thought most efficaciously served." State v. Atwood, 171 Ariz. 576, 667, 832 P.2d 593, 684 (1992), quoting Calandra, 414 U.S. at 348, 94 S. Ct. at 620. Specifically, "the rule's primary purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." Calandra, 414 U.S. at 347, 94 S. Ct. at 619-20 (emphasis added). Thus the range of application of the exclusionary rule is narrower than the range of unlawful searches.

In United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the Court considered whether the exclusionary rule served to deter judicial as well as police misconduct. In concluding that it did not, the Court stated:

> Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

Leon, 468 U.S. at 917, 104 S. Ct. at 3417-18. The Court held the exclusionary rule inapplicable when police officers act in objectively reasonable good faith on a warrant later invalidated due to judicial error because "penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Id. at 921, 104 S. Ct. at 3419.

This case falls squarely within the rule of Leon. The police officer who stopped defendant found an outstanding warrant for defendant's arrest when he ran a customary computer check. He arrested defendant and found marijuana during the search incident to the arrest. The computer gave no indication that the warrant was invalid. The evidence suggests that a justice court clerk failed to contact police department employees to inform them that the warrant had in fact been quashed. The police department was not responsible for the error. The officer arrested defendant in good faith on a facially valid warrant. Indeed, not even the court suggests that the police officer could have done anything other than arrest the defendant. It would have been misfeasance to ignore the warrant.

The court believes that Leon is distinguishable because the officers in Leon relied on a facially valid warrant while here "no warrant at all was in existence at the time of the arrest." Ante, at 5. But the officer relied upon facially valid computer information. When the computer shows an outstanding arrest warrant, the officer is expected to make an arrest. He is in the same position as one who holds an arrest warrant in his hand. It makes no difference whether, after issuance, a warrant is quashed or otherwise invalid. In both cases the warrant is without effect, yet it appears to the officer to be facially valid. In either case, Leon controls.

The court also concludes that applying the exclusionary rule is proper here because a court employee, and not a judge, committed error. But what does it matter? The exclusionary rule applies to police misconduct, not judicial department error.

Finally, the court concludes that the police cannot advance a "good faith" argument because the arrest was not a "reasonable judgmental error" as defined in A.R.S. § 13-3925. Section 13-3925 is wholly inapplicable to this case. It expressly addresses the exclusion of evidence "because of the conduct of a peace officer in obtaining the evidence." A.R.S. § 13-3925(A) (emphasis added).

Here, the conduct of the arresting officer is not challenged. Moreover, § 13-3925 was added to the criminal code in 1982 to provide a statutory good faith exception to the exclusionary rule. The United States Supreme Court sanctioned the good faith exception in 1984 when it decided Leon. After Leon, we held "that the exclusionary rule to be applied as a matter of state law is no broader than the federal rule." State v. Bolt, 142 Ariz. 260, 269, 689 P.2d 519, 528 (1984). Because our exclusionary rule cannot be narrower than the federal rule, and because we have held it to be no broader, we do not read into § 13-3925(A) that which is not required by the federal rule.

Leon requires us to determine who is responsible for error before applying the exclusionary rule. This is true for errors on police car computers.[3] Both divisions of our court of appeals recognize that the exclusionary rule is properly limited to police misconduct.[4] Today's decision, holding that the source of error is irrelevant, is a major departure from state and federal law. If it is not clear whether the police or court employees were responsible for the error, we should remand for findings on this issue. We cannot conclude that a dispositive issue is irrelevant.

To be sure, we should like to minimize computer error.[5] But the way to do this is through education, training and rigorous standards. We limit the exclusionary rule to police misconduct because its costs are so high. "Highly probative and often conclusive evidence of a criminal defendant's guilt is withheld from the trier of fact." Duckworth v. Eagan, 492 U.S. 195, 208, 109 S. Ct. 2875, 2882, 106 L. Ed. 2d 166 (1989) (O'Connor, J., concurring). Its purposeless application defeats the truthfinding process, frees the guilty, and generates disrespect for the law and the administration of justice with no offsetting benefits. Atwood, 171 Ariz. at 667, 832 P.2d at 684.

I, too, am concerned with the loss of "human liberty." Ante, at 6. But the exclusionary rule will not restore liberty to the innocent and should not restore it to the guilty. I dissent.

Frederick J. Martone, Justice

ENDNOTES

1. It is unnecessary to analyze here the purposes to be served by the exclusionary rule. We note only that deterrence of police misconduct is but one of the reasons that have been advanced in support of its use. See, e.g., Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081 (1961); Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 344, 58 L. Ed. 652 (1914).

2. In fact, the evidence suggests that this cost is insubstantial. As one commentator notes, "to date, the most careful and balanced assessment of all available empirical data shows 'that the general level of the rule's effects on criminal prosecutions is marginal at most.'" 1 Wayne R. LaFave, Search and Seizure § 1.3(c) at 52 (1986) (quoting T. Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 Am. B. Found. Research J. 611, 622); see also Peter F. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 Am. B. Found. Research J. 585, 606-07; Peter F. Nardulli, The Societal Costs of the Exclusionary Rule Revisited, 1987 U. Ill. L. Rev. 223, 238-39.

3. For example, the Appellate Court of Illinois decided a case very similar to the one we decide today. See People v. Joseph, 128 Ill. App. 3d 668, 470 N.E.2d 1303, 83 Ill. Dec. 883 (Ill. App. 1984). However, the computer error at issue in Joseph was caused by the police department. The court held that the exclusionary rule was proper because "the situation in the instant case reflects a matter within the responsibility and control of police authorities who failed to update their records to accurately reflect defendant's current status." Id. at 1306.

4. In State v. Peterson, 171 Ariz. 333, 830 P.2d 854, our court of appeals, Division 1, held that the exclusionary rule was a proper remedy to deter computer error when "any mistake was that of the police." Id. at 340, 830 P.2d at 861. Division 2 also decided the exclusionary rule was properly applied to suppress evidence found incident to an arrest caused by computer error if the error was caused by the police. State v. Greene, 162 Ariz. 383, 783 P.2d 829 (App. 1989). The court stated, "if police misconduct, whether it be negligent or deliberate, caused or contributed to the arrest notation being in the computer system, the police department would be responsible for not keeping its computer entries up to date." Id. at 384, 783 P.2d at 830. Thus the divisions are not in conflict on this issue.

5. Today we deal with computer error, not intentional misconduct. That "mischief," ante, at 6, is far more likely to be deterred by the threat of a civil action for damages than by the exclusion of evidence.

93-1736 PUGH v. ILLINOIS

Guilty pleas—Effective assistance of counsel—Erroneous advice concerning eligibility for death penalty.

Ruling below (Ill SupCt, 157 Ill.2d 1, 623 N.E.2d 255):

Trial counsel's mistaken belief that conviction of felony murder automatically made defendant eligible for death penalty without finding of intent of kill, which led counsel to advise defendant to enter pleas of guilty to all counts of indictment charging knowing and intentional murder, robbery, and other offenses, did not prejudice defendant at guilt phase of proceedings in light of facts that, after accepting plea, trial court vacated judgment of guilt on knowing and intentional murder count and entered judgment of guilt on felony murder count, and intent to commit murder is not element of felony murder count on which defendant stands convicted; accordingly, trial court did not err in denying defendant's motion to withdraw guilty pleas on grounds of ineffective assistance of counsel; judgment of guilt as to felony murder is affirmed, but his death sentence is vacated and new hearings on his eligibility for death sentence and on appropriate sentence are ordered.

Questions presented: (1) Can state deprive defendant of his right to trial when his guilty plea is entered without any consideration in sentence and is based upon trial counsel's erroneous advice as to law? (2) Should this court's decision in *North Carolina v. Alford*, 400 U.S. 25 (1970), be expanded to uphold plea when there is no consideration in terms of sentencing or charges in return for plea and defendant maintains his innocence to most serious of charges? (3) Is all-or-nothing guilty plea to charges, entered into due to misadvice by trial counsel and under misapprehension of law, voluntary under Sixth Amendment when defendant received no consideration in terms of charges to which he pleaded or sentence he received and protested his innocence to most serious charges at sentencing hearing?

Petition for certiorari filed 4/28/94, by John P. Buckley, Douglas R. Johnson, and Coffield, Ungaretti & Harris, all of Chicago, Ill.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. WILLIE C. PUGH, JR., Appellant.

PEOPLE v. PUGH

Docket No. 70615

SUPREME COURT OF ILLINOIS

157 Ill. 2d 1; 623 N.E.2d 255; 1993 Ill. LEXIS 55; 191 Ill. Dec. 10

July 22, 1993, Filed

SUBSEQUENT HISTORY: As Modified On Denial of Rehearing November 29, 1993.

DISPOSITION: Convictions affirmed; death sentence vacated; cause remanded with directions.

JUSTICE NICKELS delivered the opinion of the court:

On January 20, 1987, defendant, Willie C. Pugh, Jr., was charged by indictment in Cook County with two counts of murder (Ill. Rev. Stat. 1985, ch. 38, pars. 9-1(a)(1), (a)(2)), two counts of felony murder (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(a)(3)), one count of armed robbery (Ill. Rev. Stat. 1985, ch. 38, par. 18-2(a)), two counts of forcible detention (Ill. Rev. Stat. 1985, ch. 38, par. 10-4(a)(1)), one count of unlawful use of a weapon (Ill. Rev. Stat. 1985, ch. 38, par. 24-1(a)(7)), and three counts of aggravated unlawful restraint (Ill. Rev. Stat. 1985, ch. 38, par. 10-3.1(a)). Defendant subsequently entered blind pleas of guilty to all counts. The trial court accepted defendant's guilty pleas and entered findings of guilt on all counts. Finding that certain counts merged with others, the trial court entered judgment on felony murder (count IV), armed robbery (count V), forcible detention (counts VI and VII), and unlawful use of weapons (count VIII). Defendant's convictions for intentional and knowing murder were vacated. Defendant waived his right to a jury at his death penalty hearing. Defendant stipulated to his eligibility for the death penalty. (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6).) After hearing evidence in aggravation and mitigation, the court sentenced defendant to death on the felony-murder conviction and to terms of imprisonment on the remaining convictions. Defendant's death sentence has been stayed pending direct review by this court (Ill. Const. 1970, art. VI, § 4(b); 134 Ill. 2d Rules 603, 609(a)).

Defendant raises the following issues on appeal: (1) whether his guilty plea was involuntary by reason of ineffective assistance of counsel; (2) whether his guilty plea was involuntary due to his inability to understand; (3) whether his claim of accidental shooting during the sentencing hearing indicated his plea was not voluntary; (4) whether the finding of death penalty eligibility must be vacated because he received ineffective assistance of counsel; (5) whether the finding of death penalty eligibility must be vacated due to insufficient admonishments; (6) whether he received ineffective assistance of counsel at all phases of the proceedings due to defense counsel's failure to conduct a reasonable investigation; (7) whether he was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel; (8) whether the trial court erred in refusing to consider additional evidence in mitigation; (9) whether the death sentence is excessive in his case; and (10) whether the death penalty statute is unconstitutional.

As part of the factual basis for the pleas, the State recited the proposed testimony of two South Chicago Heights police officers. Sergeant Richard Wolff would testify that at about 9:30 p.m. on December 16, 1986, he proceeded to the Clark gas station located at 2601 Chicago Road in South Chicago Heights in response to a radio dispatch of an alarm at the station. Upon entering the station, Wolff saw defendant standing behind a counter and next to a man, later identified as 19-year-old Brian Douglas. Defendant pulled out a sawed-off shotgun and pointed it at Wolff and then at Douglas. Defendant said, "Don't push me, I want out." Douglas indicated he was being robbed. Wolff holstered his own revolver and told defendant not to shoot anyone.

Officer Michael Haskins entered the station and both he and Wolff told defendant not to shoot and to let Douglas go. While holding Douglas with one hand and the shotgun in the other, defendant walked Douglas out of the front door toward 26th Street. Defendant ordered Haskins and Wolff to stay

inside the station. Wolff called for a backup. The officers yelled to defendant to let Douglas go and the officers would not follow him.

Wolff stayed in the station and Haskins pursued defendant, who was walking around the corner of the service station near a telephone booth. Defendant had turned westward on 26th Street. When defendant stopped, Haskins was about 100 feet from him. Haskins observed defendant move about 1 1/2 steps backwards from Douglas, lower the shotgun and fire a shot into Douglas' chest area. Douglas was pronounced dead from the gunshot wound at 10:20 p.m. Haskins chased defendant about 100 feet before losing him when defendant turned the corner at 120 West 26th Street.

In an area southwest of the station, Wolff found a purple school jacket with "Central" in white lettering on the back. In the jacket sleeves he found three cartons of cigarettes identified as property from the gas station.

The victim's mother, Loretta Douglas, would testify that the purple jacket belonged to her son. She would also testify as a life-and-death witness for Douglas. Haskins would testify that upon entering the station he observed another male, later identified as Ingram Rush, exit the station carrying a coat similar to the one Wolff found. Anthony Sapit of the Cook County sheriff's department would testify that he took defendant into custody about three quarters of a block west of Chicago Road at 26th Street.

Detective Larry Dujsik and Assistant State's Attorney John Murphy would testify regarding defendant's statement made about 4:15 a.m. on December 17, 1986. After waiving his Miranda rights, defendant said that Ingram Rush was the "setup" man who was to distract the store attendant. As Rush talked to Douglas, defendant picked up some chips and soda pop. Defendant went to the cash register, pulled out a gun and told Douglas to give defendant the money and no one would get hurt. Defendant saw Douglas push the alarm button. Defendant said that when the police arrived he told them to stay there. Defendant left the store with Douglas, but had to tell the police to get back inside the station.

Defendant said that he had the gun pointed at the store as he walked with Douglas. Initially, defendant said two other men were involved in the crime and one of them shot Douglas. Defendant changed this part of his statement and said only Rush and he were involved. Defendant admitted shooting Douglas and stated, "The gun went off while it was in my hand."

Dujsik was directed by defendant to the shotgun, a spent casing and a hat. The shotgun had been dismantled-one part had been hidden under some leaves and another part had been placed in a car trunk. Testimony from a forensic expert, Karen Vander Werff, would indicate the shell came from the shotgun and pellets from Douglas' body were consistent with being fired from the shotgun. State testing showed the trigger pull was normal to medium-heavy. Autopsy results would show Douglas died from a gunshot wound to his chest about five inches to the right of the midline.

Before the factual basis was presented, the trial judge admonished defendant of the effects of his guilty plea. Defense counsel frequently referred to "technical" pleas of guilty until the trial judge advised counsel that he did not know what a "technical" plea was. At one point defendant stated with respect to his right to remain silent, "Yes, I understand, but I would like to testify in my own behalf." Defendant's attorney then told the court, "Phase 3." The judge later questioned defendant regarding the voluntariness of his, pleas. The judge noted the charges against defendant, including the fact that the State would be seeking the death penalty under section 9-1(b)(6) of the Criminal Code of 1961 (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6)). The judge recited the provisions of section 9-1(b)(6) and defendant acknowledged that he understood. Following the recitation, defendant agreed that the asserted facts were true. The trial judge accepted defendant's guilty pleas and adjudged defendant guilty of those offenses previously enumerated.

The trial judge moved immediately to the first phase of the death penalty hearing, eligibility. The assistant State's Attorney indicated that this phase would be by way of stipulation. Then, the following exchange occurred:

> "MR. SIMMONS [Assistant State's Attorney]: Judge, it will be stipulated that the Court take judicial notice of the findings of the blind plea that was just entertained by the Court as to the murder, and the felonies that the court entered judgment on. And it would also be a stipulation between the parties that the defendant is twenty-two years of age at this time or twenty-one.
>
> DEFENDANT: Twenty-two.
>
> MR. SIMMONS: Twenty-two years of age.
>
> THE COURT: So stipulated, Counsel?
>
> MR. RAGO [Defense attorney]: So stipulated.

THE COURT: You understand what that stipulation is?

DEFENDANT: Yes, sir.

THE COURT: All right, the Court will find the defendant eligible for the death penalty."

Aggravating and mitigating evidence was presented in the second phase of the death penalty hearing a few days later. In aggravation Officer Haskins elaborated on his stipulated testimony presented at the guilt phase. Particularly, he described how defendant released Douglas, took about two steps to the side, lowered the shotgun, put his other hand under the stock and, about four seconds later, shot Douglas. Officer Dujsik's testimony and the stipulated testimony of Assistant State's Attorney John Murphy showed that defendant did not indicate, nor did it appear, that he was under the influence of drugs or alcohol when he gave his statements in the early morning hours of December 17, 1986. The State also presented the stipulated testimony of Officers Wolff and Sapit, and Karen Vander Werff.

Witnesses presenting mitigating evidence included defendant's high school counselor, a family friend, the probation officer who prepared the pretrial investigation report, defendant's parents, and defendant. Other than defendant, no other witnesses testified regarding defendant's alcohol problem. Defendant testified that he did not intend to kill Douglas, but the gun discharged when defendant turned away to run. He said he had been drinking all day on December 16, 1986, and had smoked marijuana laced with PCP. Defendant expressed remorse over his actions. The pretrial investigation report showed defendant had no juvenile or adult criminal record. He completed 12 years of school and had been employed from 1983 until December 1986. Defendant indicated in the report that he consumed alcohol all day on December 16, 1986. He said he drank 10 quarts of beer and a pint of gin daily, but denied having an alcohol problem. Additionally, defendant's mother collected over 200 signatures and over 20 letters asking for mercy for defendant.

The trial judge sentenced defendant to death on the felony-murder conviction, having vacated defendant's convictions for intentional and knowing murder, and imposed prison sentences on the remaining convictions. The judge noted the lack of corroborating evidence regarding defendant's alcohol problem. A motion for reconsideration of sentence was filed on January 21, 1988. Defendant filed a motion to withdraw the plea of guilty and a request for appointment of counsel other than the public defender on February 18, 1988, alleging ineffective assistance of counsel. Defendant's attorney (hereinafter defense counsel) filed a motion to withdraw on February 18,1988, which was granted and new counsel was substituted.

On August 26, 1988, new counsel (hereinafter post-trial counsel) filed motions for a deposition and for production of the gun and access to the crime lab for testing. These motions were denied. Counsel filed a motion on September 13, 1988, for a physical examination of defendant; an amended motion to vacate the convictions; an amended motion to withdraw the guilty pleas; and an amended motion for reconsideration of the sentences. In general, it was alleged that defendant received ineffective assistance of counsel in entering his plea of guilty because his attorney did not understand that in order for defendant to be eligible for the death penalty for felony murder, defendant must have intended to kill the victim; counsel failed to investigate; and the trial court failed to properly admonish defendant. Defendant presented the September 23, 1988, affidavit of defense counsel in support of defendant's motion to vacate his plea. The affidavit provided that defendant consistently told defense counsel that defendant did not intend to kill Douglas, and the shooting was an accident. Defense counsel advised defendant to plead guilty to the indictment because he believed that a finding of felony murder by itself was sufficient to render defendant eligible for the death penalty. Defense counsel also entered into the stipulation at the eligibility phase of the death penalty hearing based on this belief. He advised defendant not to challenge the State's factual presentation or to oppose stipulations in the first two phases, and to testify only at phase III. Defense counsel would not have advised defendant to enter a plea to the indictment and further would not have entered into the stipulation if he had realized that felony murder by itself was insufficient for the death penalty. Defendant's separate affidavit of November 4, 1988, corroborated defense counsel's statements. The trial court denied the motions.

In seeking to vacate the convictions, post-trial counsel argued that there was a large amount of mitigating evidence which defense counsel failed to investigate. It was also argued that evidence existed which would have raised a reasonable doubt on defendant's eligibility for the death penalty as well as affected the evidence in aggravation at sentencing. When the trial court denied the motion, defendant's post-trial counsel filed an offer of proof. The offer of proof contained the proposed testimony of defendant's defense counsel which indicated that defendant had told him the gun trigger mechanism may have been sensitive or defective and that

defendant was drunk at the time of the crime. Defense counsel did not contact any person who signed the petition, or any of 26 character witnesses provided by defendant's mother, and only contacted three of the 24 persons who wrote letters. He did not obtain police photographs of the crime scene, nor did he interview Officers Haskins or Wolff. Although defendant had difficulty in paying attention, defense counsel did not have him examined by a doctor.

The offer of proof included the proposed testimony of five witnesses regarding defendant's intoxicated state on December 16, 1986, three of whom saw him that night. Mitigating evidence of defendant's physical problems, defendant's mental deficiencies, and other circumstances affecting defendant preceding the crime were included in the offer.

A second motion to withdraw the plea was filed on December 2, 1988, wherein defendant alleged that his plea was not voluntary due to deficits in the cognitive areas of memory, attention and concentration. The affidavit of clinical psychologist Dr. Suraleah Michaels, attached thereto, indicated she interviewed defendant on several occasions, tested defendant, and reviewed the transcript of the January 11, 1988, plea hearing. In her opinion defendant's ability to understand and comprehend the charges and admonitions was materially impaired.

Subsequent motions filed on June 1, 1989, to vacate the death sentence based on the unconstitutionality of the death penalty statute and for a new sentencing hearing were denied. This appeal followed.

First, defendant contends he received ineffective assistance of counsel in entering his guilty plea because defense counsel did not understand that in addition to proving felony murder, the State also had to prove defendant's intent to kill in order that defendant be eligible for the death penalty. Based on this misapprehension of the law, defense counsel advised defendant to enter a blind plea of guilty to the entire indictment which included intentional and knowing murder counts (Ill. Rev. Stat. 1985, ch. 38, pars. 9-1(a)(1), (a)(2)). As a result defendant contends his plea must be vacated because it was not made voluntarily and intelligently.

The State initially responds to defendant's claim by arguing that defense counsel did not misapprehend the law, as evidenced by a motion to preclude the death penalty filed on February 27, 1987. In that motion defense counsel claimed that under Enmund v. Florida (1982), 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368, involving felony murder, defendant could not be sentenced to death unless the State proved defendant intended to kill the person who was killed. Claiming the motion and defense counsel's affidavit are in direct contradiction, the State makes the serious charge that defense counsel is guilty of unethical behavior by attempting to interject potentially reversible error into the plea proceeding, a charge we reject in our later discussion.

Assuming defense counsel did not misapprehend the law, the State then claims that defense counsel's advice was merely reasonable strategy based upon the law and facts. According to the State, the evidence of defendant's intent to kill or knowledge that his conduct created a strong probability of death or great bodily harm (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6)(b)) was so overwhelming that defendant's only hope was to enter a blind guilty plea and throw himself on the mercy of the court. When this calculated and informed risk failed, the State contends, defense counsel filed the affidavit.

The State cites Stewart v. Peters (7th Cir. 1992), 958 F.2d 1379, in support of its argument that defendant's blind plea was only an attempt to seek the mercy of the court. However, in Stewart, the attorney was not operating under a misapprehension of law, and the record established that the plea was a calculated and informed risk that failed.

Whether to permit a guilty plea to be withdrawn is within the sound discretion of the trial court. (People v. Hillenbrand (1988), 121 Ill. 2d 537, 545, 521 N.E.2d 900.) Such discretion should be exercised liberally, particularly in capital cases, in favor of life and liberty. (People v. King (1953), 1 Ill. 2d 496, 500, 116 N.E.2d 623.) When it appears that the guilty plea was entered on a misapprehension of the facts or of the law, or in consequence of misrepresentations by counsel, or the case is one where there is doubt of the guilt of the accused or where the accused has a defense worthy of consideration by a jury or where the ends of justice will be better served by submitting the case to the jury, the court should permit withdrawal of the guilty plea. (People v. Johnson (1993), 154 Ill. 2d 356, 361-62, 609 N.E.2d 294; People v. Morreale (1952), 412 Ill. 528, 531-32, 107 N.E.2d 721.) A defendant may enter a guilty plea because of some erroneous advice by his counsel, but this fact alone does not destroy the voluntary nature of the plea. (People v. Correa (1985), 108 Ill. 2d 541, 548-49, 485 N.E.2d 307.) The resolution of the question of whether the defendant's pleas, made in reliance on counsel's advice, were voluntarily, intelligently, and knowingly made depends on whether the defendant

had effective assistance of counsel. Correa, 108 Ill. 2d at 549.

The proper standard for determining whether defendant was denied effective assistance of counsel in entering his guilty plea is set forth in Hill v. Lockhart (1985), 474 U.S. 52, 57, 88 L. Ed. 2d 203, 209, 106 S. Ct. . 366, 369-70. In Hill the United States Supreme Court found that the two-part test announced in Strickland v. Washington (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, for ineffective-assistance-of-counsel claims was applicable to the plea process. (People v. Jones (1991), 144 Ill. 2d 242, 254, 579 N.E.2d 829.) This court has adopted the standard. (Jones, 144 Ill. 2d at 254; People v. Huante (1991), 143 Ill. 2d 61, 67-68, 571 N.E.2d 736.) To establish that a defendant was deprived of effective assistance of counsel, a defendant must establish both that his attorney's performance was deficient and that the defendant suffered prejudice as a result. Hill, 474 U.S. at 57, 88 L. Ed. 2d at 209, 106 S. Ct. at 369; Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064; Huante, 143 Ill. 2d at 67-68.

In order to satisfy the "prejudice" requirement in a plea proceeding, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. (Hill, 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370.) The instant defendant argues that the second prong of the Strickland standard has been met herein as evidenced by defense counsel's and defendant's attestations that defendant would not have entered a guilty plea but for counsel's error. The State correctly points out that under Hill, the question of whether the error prejudiced the defendant by causing him to plead guilty rather than to go to trial depends in large part on a prediction of whether the defendant likely would have succeeded at trial. (Hill, 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370-71; Jones, 144 Ill. 2d at 254-55; see Huante, 143 Ill. 2d at 73.) The record should demonstrate a "reasonable probability" that but for the error, the defendant would have rejected the plea arrangement. (See Huante, 143 Ill. 2d at 73.) As under Strickland, we need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. See People v. Albanese (1984), 104 Ill. 2d 504, 527, 473 N.E.2d 1246.

The State contends that defendant was not prejudiced by defense counsel's failure to advise defendant to proceed to trial on a theory of accident because the likelihood that defendant would have been acquitted on the intentional and knowing murder counts is infinitesimal. The State dismisses the additional evidence that post-trial counsel found upon his investigation as either irrelevant or not credible. The State also claims that accident, even if proved, is not a defense to felony murder. People v. Allen (1974), 56 Ill. 2d 536, 309 N.E.2d 544.

Defendant argues that he was prejudiced by defense counsel's misapprehension of the law because he pleaded guilty to intentional and knowing murder, thus establishing the statutory aggravating factors necessary for death penalty eligibility. He claims that had his theory of accident been presented at a trial, a reasonable doubt of his guilt would have existed as to the intentional and knowing murder counts.

We need not address whether defendant was prejudiced with respect to his guilty pleas to intentional and knowing murder because those convictions were vacated by the trial court. When multiple murder convictions have been entered for the same act, the less culpable convictions must be vacated. (People v. Pitsonbarger (1990), 142 Ill. 2d 353, 377, 568 N.E.2d 783.) Although an intentional killing involves the more culpable mental state than knowing and felony murder (People v. Mack (1984), 105 Ill. 2d 103, 137, 473 N.E.2d 880), the trial court herein vacated the convictions for intentional and knowing murder. The State has raised no error with respect to the trial court's ruling. Therefore, defendant stood convicted of only the felony murder when the hearing to determine death sentence eligibility began.

Defendant does not claim that he would have succeeded at trial on a theory of accident with respect to the felony-murder count. In his reply brief, defendant concedes that accident is not a defense to felony murder. (Allen, 56 Ill. 2d at 544-45.) Thus, even if defense counsel had presented defendant's theory of accident at a trial on felony murder, defendant would not have been acquitted of that offense. Defendant suffered no prejudice at the guilt phase of the proceedings due to defense counsel's misapprehension of law. Defendant's plea of guilty to felony murder stands.

We turn now to the sentencing phase of the proceeding. Our first inquiry is whether defense counsel's performance was deficient in that it "fell below an objective standard of reasonableness." (Strickland, 466 U.S. at 688, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064; Huante, 143 Ill. 2d at 68.) The standard for reasonableness in guilty plea cases "'depends *** not on whether a court would retrospectively consider counsel's advice to be right or wrong, but whether that advice was within the range of competence demanded of attorneys in

criminal cases.'" Huante, 143 Ill. 2d at 68-69, quoting McMann v. Richardson (1970), 397 U.S. 759, 770-71, 25 L. Ed. 2d 763, 773, 90 S. Ct. 1441, 1448-49.

Defense counsel was incorrect in his belief that defendant was eligible for the death penalty based solely on a finding of felony murder. An essential element which the State must prove besides the felony murder is a culpable (intentional or knowing) mental state. (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6)(b); People v. Ramey (1992), 151 Ill. 2d 498, 545, 603 N.E.2d 519.) The statutory aggravating factor relied on in this case as the basis for imposition of the death penalty is a narrow form of the felony-murder rule. (Ill. Rev. Stat. 1985, ch. 38, par. 9-1 (b)(6)(b); People v. King (1986), 109 Ill. 2d 514, 542, 488 N.E.2d 949.) To establish this factor, the State must prove beyond a reasonable doubt (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(f); see Ramey, 151 Ill. 2d at 544) that the defendant acted with the intent to kill or that he acted knowing his conduct created a strong probability that the victim would die or suffer great bodily harm (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6)(b); Ramey, 151 Ill. 2d at 541; King, 109 Ill. 2d at 542). Death sentences have been upheld when the evidence has been sufficient to support a finding of the alternative mental state, knowledge. King, 109 Ill. 2d at 542.

After examining the motion to preclude imposition of the death penalty filed in the instant case, we find it does not contradict defense counsel's affidavit. We note that the motion was never ruled on by the trial court or apparently presented for a hearing by defense counsel. While both sides theorize as to the reasons that counsel abandoned the motion, we need not indulge in such speculation in view of our determination.

In the motion defense counsel did not raise the issue of lack of intent to kill, which intent was required under the Illinois statutory aggravating factor to impose the death penalty (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6)(b)). Rather, defense counsel argued that under Enmund v. Florida (1982), 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368, defendant could not be sentenced to death for felony murder unless the State could prove defendant had the intent to kill. Counsel claimed the State had no evidence that defendant intended to kill in this case and thus the State had no good-faith basis to seek the death penalty; We also note that defense counsel did not argue that the State lacked sufficient evidence to prove that defendant acted knowingly. Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6)(b).

Counsel cited People v. Jones (1982), 94 Ill. 2d 275, 447 N.E.2d 161, in the motion to preclude as basic source material supporting the necessity-of-intent proposition. Jones, however, concerned a defendant sentenced to death under section 9-1(b)(3) of the Criminal Code, murder of two or more individuals. (Ill. Rev. Stat. 1979, ch. 38, par. 9-1(b)(3).) The Jones court relied on Enmund in vacating one of three death sentences.

Defense counsel's failure to rely upon Illinois statutory law in the motion shows a lack of knowledge or understanding of the law. This indication is later confirmed, not contradicted, by his affidavit. Counsel's stipulation to defendant's eligibility for the death penalty further corroborates counsel's mistaken belief that defendant had no defense to death penalty eligibility because of the felony-murder conviction.

Thus, the State's argument that defense counsel exercised reasonable strategy based upon Illinois law and the facts of this case is not supported by the record. Defense counsel's advice to defendant was attributable to counsel's misapprehension of the law and not to tactics or strategy. (See People v. Wright (1986), 111 Ill. 2d 18, 26-27, 488 N.E.2d 973; People v. Hayes (1992), 229 Ill. App. 3d 55, 62-63, 593 N.E.2d 739.) It is clear that counsel's advice, based upon a misapprehension of the law, fell outside the range of competence demanded of attorneys in criminal cases. Huante, 143 Ill. 2d at 68-69.

We do find that defendant was prejudiced by defense counsel's misapprehension of the law at the first phase of the sentencing proceeding, death penalty eligibility. Since defense counsel did not understand that in addition to proving felony murder the State had to prove beyond a reasonable doubt that defendant possessed the culpable mental state of intent or knowledge, defense counsel stipulated to defendant's eligibility for the death penalty. The State argues that the exchange between the court and the parties set out earlier in this opinion was not a stipulation to death penalty eligibility. First, defense counsel's affidavit indicates it was such a stipulation. Second, the trial court understood and accepted it as a stipulation to death penalty eligibility. At the sentencing hearing on January 14, 1988, the judge stated, "And the second phase is stipulated that defendant is eligible for the death penalty." The judge later said "that the factors in aggravation, which would allow the imposition of the death penalty were stipulated to." Obviously the trial court had not merely taken judicial notice of the facts and made his own determination nor had he improperly relied on the vacated convictions of intentional and knowing murder to find defendant eligible for the death penalty. Thus, defendant waived a hearing on the issue of death penalty eligibility and stipulated to

his eligibility for such penalty based on counsel's misapprehension of law.

After examining the entire record, there is a reasonable probability that but for counsel's error, defendant would have rejected the stipulation to death penalty eligibility because defendant's evidence pointed to an accidental shooting. (See Huante, 143 Ill. 2d at 73.) None of defendant's evidence was presented by defense counsel at the first phase of sentencing because counsel believed such evidence was irrelevant once felony murder was established.

It is apparent from post-trial counsel's investigation that evidence existed to discredit Officer Haskins as the only eyewitness to the shooting. First, Office Wolff's police report indicates that Haskins was ordered inside by defendant, but it fails to mention that Haskins went outside again. While defendant argues that the report contradicts Haskins' testimony that he was outside when defendant shot Douglas, we find it does not corroborate Haskins' account. This fact is still significant.

Other evidence revealed by post-trial counsel likely would have discredited Haskins' testimony, thus eliminating the only eyewitness to the shooting. Although the State contends this evidence is either irrelevant or corroborative of Haskins' testimony, we disagree. First, Haskins said he was about 100 feet away. The diagram of the scene shows lights around the station; however, some of the lights were deflected toward the station. Lights aimed at Haskins would have impaired his ability to see rather than assist it. Photographs also indicate that Haskins was looking out into an area of darkness where the shooting occurred. Photographs show that without the aid of police lighting, the location of the shooting was dark. The report of Officer Wolff shows he had to use his flashlight to determine that Douglas was shot. There were also obstacles between the station and the shooting which could have impaired Haskins' view further.

Haskins said he chased defendant about 100 feet as defendant ran west and then turned north. Defendant actually ran south. The State points out that at a hearing on Ingram Rush's motion to suppress, Haskins thought defendant ran north because he lost sight of defendant. While this point alone would not be sufficient to discredit Haskins, the impeachment evidence taken as a whole would have cast sufficient doubt on his testimony.

We also note that the gunshot wound to the right of Douglas' chest corroborates defendant's story that the gun went off as defendant ran away. The State claims this fact could be due to Douglas' movement; however, this argument contradicts Haskins' statement that Douglas did not move. The State posits that a sawed-off shotgun is not accurate, but defendant was only a few feet from Douglas. The State asserts that the wound was consistent with Haskins' testimony at sentencing that defendant stepped to the side of Douglas. However, Haskins' police report and his stipulated testimony at the plea hearing indicated that defendant stepped backwards from Douglas and not to the side.

While defendant told his attorney the trigger pull was sensitive, defense counsel failed to test the gun. Once again the State assumes that defendant was not prejudiced by this in view of the State's findings that the trigger pull was normal to medium-heavy. The State implies that counsel made an informed choice not to test the gun, when the overall circumstances surrounding this case show that counsel did not investigate defendant's defense to death penalty eligibility due to counsel's misapprehension of the law.

The failure to investigate and present this evidence prejudiced defendant and cannot be dismissed, as the State suggests, as merely a different manner of impeachment (see People v. Flores (1989), 128 Ill. 2d 66, 538 N.E.2d 481). The State, relying on People v. Del Vecchio (1985), 105 Ill. 2d 414, 475 N.E.2d 840, argues that defendant was not prejudiced because the trial court rejected his defense after the sentencing hearing. The opinion in Del Vecchio merely indicates that after hearing evidence of the defendant's insanity claim, the court rejected it. In the case at bar, the trial court was only presented with defendant's testimony as to his claim of accident. It did not hear all the evidence at the sentencing hearing because defense counsel had not presented it. The State correctly notes that the trial court found the police officers credible; however, the court made this finding in the absence of the impeachment evidence. Since defense counsel failed to present all the evidence at the sentencing hearing, we do not find the court's imposition of the death penalty a reliable indication that defendant was not prejudiced at the death penalty eligibility phase of the hearing.

The State contends that even in the absence of an intent to kill, defendant was death penalty eligible based on knowing murder by his own account. The fact that defendant admitted sawing off the shotgun goes to his intent to commit armed robbery. While defendant said he "waved" the shotgun, he said he did this while in the gas station. Defendant emphatically denied pointing the shotgun at Douglas or holding it in his direction at the time of the shooting. Unlike People v. King (1986), 109 Ill. 2d 514, 488 N.E.2d 949, wherein the defendant

pushed the victim while holding a loaded gun to his head, defendant herein claimed not to have pointed the gun at Douglas at the time of the shooting. Evidence did show the shotgun had to be cocked first, but testimony indicated it could remain cocked until the trigger was pulled.

Similarly, the defendants in People v. Owens (1984), 102 Ill. 2d 88, 464 N.E.2d 261, and People v. Eddmonds (1984), 101 Ill. 2d 44, 461 N.E.2d 347, were engaged in conduct at the time of the victim's death from which a knowing mental state could be inferred. Defendant herein had always maintained that he was fleeing when the gun went off accidentally. In the absence of credible eyewitness testimony to the contrary, we cannot conclude that defendant would have been found eligible for the death penalty beyond a reasonable doubt. The State relies on People v. McEwen (1987), 157 Ill. App. 3d 222, 510 N.E.2d 74, regarding accident and felony murder. A close reading of McEwen shows the case concerned a conviction of felony murder and did not involve the death penalty. And, in People v. Barker (1980), 83 Ill. 2d 319, 415 N.E.2d 404, the defendant fired a shotgun in the direction of police officers which was sufficient to find attempted murder. Here, defendant claimed the firing of the gun was accidental.

The State is correct in its claim that accident would not relieve defendant of guilt for the felony-murder count. (See People v. Chandler (1989), 129 Ill. 2d 233, 248, 543 N.E.2d 1290; Allen, 56 Ill. 2d 536, 309 N.E.2d 544.) However, the statutory aggravating factor necessary to impose the death penalty is not proved by a conviction of felony murder alone. (See People v. Holman (1984), 103 Ill. 2d 133, 159, 469 N.E.2d 119.) Thus, defendant was prejudiced by counsel's misapprehension of the law with respect to the first phase of the death penalty sentencing hearing. The ineffectiveness of defense counsel requires that defendant's death sentence be vacated and the cause remanded for a new death qualifying and sentencing hearing.

Next, defendant contends that his ability to comprehend the charges and admonishments during the guilt phase of the plea proceeding was materially impaired. He relies on the opinion of Dr. Michaels, who tested and interviewed defendant many months after his conviction and sentence. Defendant claims that based on that evidence the trial court should have vacated his plea or ordered an evidentiary hearing.

A defendant is competent to plead guilty if he is capable of understanding the proceedings and assisting in his own defense even if he may be mentally or emotionally disturbed. (People v. Van Ostran (1988), 168 Ill. App. 3d 517, 522 N.E.2d 851.) Whether a bona fide doubt has been raised is a decision resting largely within the discretion of the trial court. (See People v. Murphy (1978), 72 Ill. 2d 421, 381 N.E.2d 677.) The trial court, unlike a court of review, is in a position to observe the defendant and evaluate his conduct. (Murphy, 72 Ill. 2d at 431.) The mere fact that a psychologist expressed the opinion that defendant was not competent did not mandate a similar finding by the trial court, as the ultimate issue is for the trial court, not the experts, to decide. People v. Bleitner (1990), 199 Ill. App. 3d 146, 556 N.E.2d 819.

The trial judge observed defendant's conduct and demeanor at the time of the guilty plea. It is clear from the record that defendant was competent to enter a guilty plea. The trial court did not abuse its discretion in refusing to conduct an evidentiary hearing or vacate the guilty plea.

In the third issue, defendant contends that by claiming at the sentencing hearing that the shooting was accidental, his guilty plea was vitiated. (See Brady v. United States (1970), 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463.) He argues that when he denied an intentional shooting by claiming he accidentally shot Douglas, the trial judge had a duty to inquire whether defendant understood the nature and consequences of his plea, and the stipulation to death penalty eligibility. Due to the judge's failure to so inquire, defendant claims his plea and stipulation must be vacated.

In Illinois, a court is not precluded from accepting a plea of guilty, in spite of a defendant's claim of innocence, if the record reflects a factual basis from which a jury could find the defendant guilty of the offenses to which the plea was entered. (People v. Barker (1980), 83 Ill. 2d 319, 415 N.E.2d 404.) We have already noted the fact that defendant's convictions for intentional and knowing murder were vacated. Defendant's claim of an accidental shooting did not vitiate his guilty plea with respect to his felony-murder conviction, as accident is not a defense to that offense. The court did not abuse its discretion in denying defendant's motion to withdraw defendant's plea of guilty. Defendant's death sentence has been vacated on other grounds by this court.

Defendant attacks the death penalty eligibility phase of the proceeding on another ground. He claims that the stipulation was tantamount to a guilty plea and thus he should have received admonishments by the trial court. (See People v. Smith (1974), 59 Ill. 2d 236, 319 N.E.2d 760; People v. Stepheny (1974), 56 Ill. 2d 237, 306

N.E.2d 872.) Defendant improperly argues in a footnote that he was not apprised of his right to testify at phase two. Since we have determined that defendant must receive a new death penalty eligibility hearing due to ineffectiveness of defense counsel, we do not address this issue.

Defendant asserts that he received ineffective assistance of counsel at all phases of the proceedings due to defense counsel's failure to conduct a reasonable investigation. Particularly defendant argues that defense counsel did not properly investigate defendant's claim of accidental shooting or seek information to discredit Officer Haskins. He contends that his attorney failed to investigate and present evidence in mitigation at the second phase of defendant's sentencing hearing. In view of our holding that defendant is to receive a new sentencing hearing, we do not address this issue.

Based on our holding, we find it unnecessary to address defendant's other issues concerning an evidentiary hearing on his claim of ineffective assistance of counsel; the court's failure to consider additional evidence in mitigation; or whether the death sentence is excessive in this case. While defendant argues that the Illinois death penalty statute is unconstitutional, he provides no citation of authority to support his argument, nor does he attempt to address this court's prior holdings on the matter. This court has previously rejected defendant's arguments, and we see no reason to disturb those decisions. Ramey, 151 Ill. 2d 498, 603 N.E.2d 519.

For the reasons stated, defendant's convictions are affirmed, but his sentence of death is vacated. The cause is remanded to the circuit court of Cook County for a new hearing to determine defendant's eligibility for the death penalty; as well as a new sentencing hearing. We direct that the hearing be held before a different trial judge.

Convictions affirmed; death sentence vacated; cause remanded with directions.

JUSTICE HARRISON, dissenting:

Based on his counsel's advice, defendant pled guilty to counts of intentional, knowing and felony murder. The trial court entered judgment on only one count of felony murder. This was improper. Because all counts involved the same homicide and because intentional murder involves a more culpable mental state and is a more serious crime than felony murder, the trial court should have entered a judgment of conviction only for intentional murder and vacated defendant's convictions for knowing and felony murder. See People v. Pitsonbarger (1990), 142 Ill. 2d 353, 377-78, 568 N.E.2d 783; People v. Lego (1987), 116 Ill. 2d 323, 344, 507 N.E.2d 800; People v. Guest (1986), 115 Ill. 2d 72, 104, 503 N.E.2d 255.

Although the majority concedes that counsel's advice was based upon a misapprehension of the law, it concludes that defendant did not sustain prejudice at the guilt phase of the proceedings as a result of counsel's misguidance because defendant's claim of accident would not have prevented his conviction for felony murder and, based on the trial court's error, judgment was in fact entered for felony murder. Contrary to the majority, I do not believe that errors committed by the trial court, regardless of the windfall they may bestow upon a defendant, should be considered in determining whether that defendant was prejudiced by his counsel's ineffective assistance. Here, but for the trial court's error, defendant would be death-qualified based upon his counsel's advice to plead guilty to all counts. Had the defendant been fully advised, he would have realized to what extent he was placed in jeopardy by the plea. Under these circumstances, it is difficult to understand how it would have been to his advantage to plead guilty to counts of intentional, knowing and felony murder. Therefore, I would hold that there was a "reasonable probability" that, but for defense counsel's mistaken belief that felony murder alone was sufficient to qualify defendant for the death penalty, defendant would have rejected the plea arrangement. Hill v. Lockhart (1985), 474 U.S. 52, 59, 88 L. Ed. 2d 203, 210, 106 S. Ct. . 366, 370; see also People v. Huante (1991), 143 Ill. 2d 61, 73, 571 N.E.2d 736.

While the majority is correct in noting that accident would not relieve defendant of guilt for felony murder (People v. Allen (1974), 56 Ill. 2d 536, 545, 309 N.E.2d 544), the statutory aggravating factor necessary to impose the death penalty is not proved by a conviction of felony murder alone (see People v. Holman (1984), 103 Ill. 2d 133, 159, 469 N.E.2d 119). Intent or knowledge must also be established. If defendant had gone to trial and been acquitted on the intentional and knowing murder counts, the State would have been precluded from seeking the death penalty. Instead, defendant followed counsel's advice, pled guilty to those counts and stipulated to the requisite statutory aggravating factor necessary for the death penalty. Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6).

It is therefore clear that defendant gained nothing in entering a guilty plea, despite the presence of evidence which the majority admits may relieve

him of guilt for intentional and knowing murder. Further, it cannot be concluded that defendant made an informed decision that his interest required entry of a guilty plea despite his belief he did not intentionally kill Brian Douglas. (See People v. Barker (1980), 83 Ill. 2d 319, 332, 415 N.E.2d 404 (discussing North Carolina v. Alford (1970), 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. . 160).) Defendant's guilty plea was based on ineffective assistance of counsel and should be vacated. I would therefore reverse and remand the judgment of the circuit court. While I realize that defense counsel's misapprehension of the law went to the death penalty aspect of this case, counsel's ineffectiveness so infected defendant's defense that the ends of justice would be better served by permitting defendant to withdraw his entire guilty plea.

93-1679 BRITENBACH v. U.S.

Sentencing—Federal guidelines—Career offenders—Conspiracy—Denial of trial motion for continuance.

Ruling below (*U.S. v. Heim*, CA 9, 15 F.3d 830):

In devising "career offender" provisions of federal Sentencing Guidelines, Sections 4B1.1 and 4B1.2, U.S. Sentencing Commission relied not only upon 18 USC 994(h), which directs commission to provide sentences at or near statutory maximum for persons who have repeatedly committed crime of violence or "offense described in section 401 of Controlled Substances Act [i.e. substantive drug offenses in violation of 21 USC 841]," but also upon commission's authority under 28 USC 994(a)(2) to promulgate general rules regarding other aspects of sentencing that are "consistent with" Congress' directives; commission's decision to include conspiracy to commit drug offense among predicate crimes that make defendant eligible for sentencing as career offender was proper exercise of authority under Section 994(a)(2), even though conspiracy to commit drug offense does not fall within category of offenses described in Section 994(h); commission's decision to go beyond mandate of Section 994(h) is also consistent with legislative history making clear that Section 994(h) was not intended to be ceiling for establishing career offender provisions.

Ruling below (*U.S. v. Heim*, CA 9, 1/24/94, unpublished):

Record shows that, although trial court mentioned that defense counsel had voluntarily undertaken representation when it denied defense motion for continuance grounded on fact that counsel had been appointed only 44 days earlier, trial court carefully weighed other legitimate factors—such as difficulty in trying particular case and judicial economy—before deciding to deny continuance motion; defendant's attempt to show prejudice from denial of continuance motion by pointing out instances in which counsel failed to object to admission of certain hearsay statements fails in light of conclusion that additional trial preparation would not have aided counsel in isolating which of co-conspirator's hearsay statements were in furtherance of conspiracy—and thus admissible—and which were mere narrative.

Questions presented: (1) Did Sentencing Commission exceed its jurisdictional authority in designating conspiracy to commit narcotics offense as predicate for application of "career offender" guideline? (2) Did court below err in validating trial court's refusal of defendant's trial continuance motion?

Petition for certiorari filed 4/25/94, by Nicholas DePento, of San Diego, Calif.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WAYNE RODNEY HEIM; DYAN JONES; STEVEN ROBERT BRITENBACH; DWAYNE KEITH FITZEN,Defendants-Appellants.

UNITED STATES v. HEIM

Nos. 93-30090, 93-30091, 93-30092, 93-30101

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT15 F.3d 830; 1994 U.S. App. LEXIS 1122; 94 Cal. Daily Op. Service 485; 94 Daily Journal DAR 805

November 1, 1993, Argued, Submission Deferred; November 15, 1993, Submitted, Seattle, Washington
January 24, 1994, Filed

PRIOR HISTORY: Appeal from the United States District Court for the District of Idaho. D.C. No. CR-92-021-EJL. Edward J. Lodge, District Judge, Presiding.

COUNSEL:
Monte R. Whittier, Whittier, McDougall, Souza, Murray & Clark, Pocatello, Idaho, for defendant-appellant Dwayne Keith Fitzen.

Steven V. Richert, Green, Service, Gasser & Kerl, Pocatello, Idaho, for defendant-appellant Wayne Rodney Heim.

Nicholas DePento, San Diego, California, for defendant-appellant Steven R. Britenbach.

Kelly Kumm, Jones, Chartered, Pocatello, Idaho, for defendant-appellant Dyan Jones.

Monte J. Stiles, Assistant United States Attorney, Boise, Idaho, for the plaintiff-appellee.

JUDGES: Before: Thomas Tang, Jerome Farris and Pamela Ann Rymer, Circuit Judges.

FARRIS, Circuit Judge:

Wayne Rodney Heim, Dwayne Keith Fitzen, Dyan Jones and Steven R. Britenbach appeal their convictions for conspiracy to distribute controlled substances in violation of 18 U.S.C. §§ 841(a)(1) and 846. Britenbach also appeals his convictions on six counts of violating the Travel Act, 18 U.S.C. § 1952. All four defendants appeal their sentences. We have jurisdiction over their appeals pursuant to 28 U.S.C. § 1291. The convictions of all four co-defendants and the sentences of Heim, Fitzen and Jones are affirmed in a separate unpublished disposition. In this opinion, we affirm Britenbach's sentence.

I. FACTS

The evidence at trial established that defendants Heim, Fitzen, Jones and Britenbach conspired to distribute controlled substances in violation of 18 U.S.C. §§ 841(a)(1) and 846. During the course of the conspiracy, Fitzen, Heim and Jones resided in Pocatello, Idaho while Britenbach operated in Southern California. Britenbach and, to a lesser extent, co-defendant Mike Luce (who pleaded guilty) supplied cocaine and marijuana to the Pocatello co-conspirators.

The district court sentenced Britenbach as a career offender under § 4B1.1 of the United States Sentencing Guidelines. Section 4B1.1 provides that a defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1. The commentary to § 4B1.2 states that the term "controlled substance offense" includes the offense of conspiring to commit a controlled substance offense. U.S.S.G. § 4B1.2 comment. (n.1).

In finding that Britenbach was a career offender, the district court relied on two prior controlled substance felony convictions (a 1975 conviction for importation of controlled substances

and a 1985 conviction for possession of narcotics with the intent to distribute) and the instant conspiracy conviction.

II. Use of Conspiracy Conviction Toward Career Offender Status

Britenbach argues that the United States Sentencing Commission exceeded its statutory authority by including conspiracy within the definition of a "controlled substance offense." He relies on United States v. Price, 301 U.S. App. D.C. 97, 990 F.2d 1367 (D.C.Cir. 1993) for this proposition. We reject his argument. The Sentencing Commission properly included conspiracy within the definition of "controlled substance offense."[1]

We review the legality of a sentence de novo. United States v. Fine, 975 F.2d 596, 599 (9th Cir. 1992) (en banc). The commentary to § 4B1.1 explains that "28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined in the statute, receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this mandate." U.S.S.G. § 4B1.1, comment. (backg'd). The pertinent language in § 994(h) provides that the Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and . . . has been convicted of a felony that is . . . a crime of violence[,] or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. § 841) . . . and . . . has previously been convicted of two or more prior felonies, each of which is . . . a crime of violence[,] . . . or an offense described in section 401 of the Controlled Substances Act . . . . 28 U.S.C. § 994 (h). Section 401 of the Controlled Substances Act prohibits substantive controlled substance offenses, but makes no mention of conspiracy. 21 U.S.C. § 841. In Price, the court reasoned that "[a] conspiracy to commit a crime involves quite different elements from whatever substantive crime the defendants conspire to commit" and therefore conspiracy to violate the Controlled Substances Act "cannot be said to be one of the offenses 'described in'" § 401 of the Act. Price, 990 F.2d at 1369. The court held that because the Commission had relied on § 994(h) as the enabling statute for adopting §§ 4B1.1 and 4B1.2, the Commission had offered a "legally invalid" reason for including conspiracy within the definition of "controlled substance offense." Id. at 1370.

The commentary to § 4B1.1 should be read less restrictively. It indicates that the career offender guidelines were intended to "implement[ ] the mandate" of § 994(h). The language means what it says - the Commission intended to implement the mandate of § 994(h). Nowhere in the commentary to § 4B1.1 does the Commission suggest that it considered § 994(h) to be the sole legal authority for promulgating the career offender guidelines. Cf. United States v. Parson, 955 F.2d 858, 866-67 (3d Cir. 1992) (holding that definition of "crime of violence" in career offender guidelines is not restricted to definition contained in § 994(h)). Elsewhere in the Guidelines, the Commission has explained that "the guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code." U.S.S.G., Ch. 1, Part A, § 1. Section 994(a)(2) provides that the Commission shall promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code . . . ." 28 U.S.C. § 994(a)(2). Therefore, in deciding to include conspiracy within the definition of "controlled substance offense" for purposes of determining the offense level of career offenders, the Commission was lawfully exercising its authority under § 994(a)(2).[2]

The Commission's decision to go beyond the mandate of § 994(h) is also consistent with the legislative history to § 994(h). The Senate Report made clear that § 994(h) was not intended as a ceiling for establishing career offender guidelines: "[Section 994(h) is] not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified." S.Rep. No. 98-225, 98th Cong., 1st Sess. 307 (1983), in 1984 U.S.C.C.A.N. 3182, 3359.

We hold that the Sentencing Commission did not exceed its statutory authority in including conspiracy within the definition of "controlled substance offense" in §§ 4B1.1 and 4B1.2.

III. Inclusion of Britenbach's 1975 Offense

Britenbach also asserts that the district court erred in counting the earlier of his two prior felony convictions (the 1975 conviction for importation of cocaine) toward career offender status.

The district court's application of the Sentencing Guidelines is reviewed de novo. United States v. Fagan, 996 F.2d 1009, 1017 (9th Cir. 1993). Factual findings in the sentencing phase are reviewed for clear error. United States v. Chapnick, 963 F.2d 224, 226 (9th Cir. 1992).

Prior felony convictions can count toward career offender status if they resulted in a prison sentence in excess of one year and one month and if the defendant was incarcerated for that sentence during the 15 year period preceding defendant's involvement in the instant offense. See U.S.S.G. §§ 4B1.2 comment. (n.4), 4A1.2(e)(1).

Britenbach was arrested in New York for importation of controlled substances in 1975. While he was released on bond for that arrest, he was arrested in Mexico on drug charges. He was incarcerated in Mexico until 1978 when he was returned to New York on a prisoner exchange. The New York charges were then resolved by crediting him for time served in Mexico and requiring him to serve the balance of his term in a New York prison until 1980. Britenbach argues that he should not have been attributed career offender status because he was unable to resolve the charges from his New York arrest in 1975 (potentially over 15 years before his involvement in the instant conspiracy).

Britenbach's argument lacks merit. Under the Guidelines, a conviction for which a defendant is serving a sentence during the applicable 15 year period counts toward career offender status. The ultimate resolution of the New York charges resulted in Britenbach's serving time in New York from 1978-1980 and he was given credit for time served in Mexico. The district court made the factual finding that Britenbach first became involved in the instant conspiracy in January 1991 (11 years after his 1980 release date). Britenbach would have been within the fifteen year statutory range even if he had only served a one year sentence in New York beginning in 1975. The district court properly included the 1975 controlled substance offense as a "prior felony" conviction under § 4B1.1.

IV. The District Court's Failure to Depart Downward

Britenbach argues that the district court failed to realize that it had the authority to depart downward based on his age and medical condition. The record fails to suggest that the district court was under the impression that it could not depart downward if it chose to do so. A district court's discretionary refusal to depart from the Sentencing Guidelines is not reviewable on appeal. United States v. Morales, 972 F.2d 1007, 1011 (9th Cir. 1992), cert. denied, 123 L. Ed. 2d 283, 113 S. Ct. 1665 (1993).

AFFIRMED

ENDNOTES

1. Other Circuits have accepted the inclusion of conspiracy as a predicate offense under the career offender guidelines. See United States v. Fiore, 983 F.2d 1 (1st Cir. 1992), cert. denied, 123 L. Ed. 2d 458, 113 S. Ct. 1830 (1993); United States v. Whitaker, 938 F.2d 1551 (2d Cir. 1991), cert. denied, 117 L. Ed. 2d 141, 112 S. Ct. 977 (1992); United States v. Jones, 898 F.2d 1461 (10th Cir.), cert. denied, 498 U.S. 838, 112 L. Ed. 2d 81, 111 S. Ct. 111 (1990).

2. The Price court noted that the Commission "may well be free" to include conspiracy within the definition of controlled substance offense pursuant to the Commission's broad mandate in 28 U.S.C. § 994(a). Price, 990 F.2d at 1369. However, there is no indication that the Price court considered the Commission's explanation that the Guidelines were, in fact, promulgated pursuant to the Commission's general authority in § 994(a).

93-1734 STEPHENS v. MILLER

Evidence—Rape shield statutes—Right to testify—Exclusion of defendant's comments during sexual act regarding complainant's past sexual conduct.

Ruling below (CA 7 (en banc), 13 F.3d 998, 54 CrL 1398):

Habeas corpus petitioner's constitutional right to testify was not violated when, at his state trial on rape charge, trial court ruled that rape shield statute's ban on evidence concerning victim's past sexual conduct barred petitioner from testifying as to substance of remark he claimed to have made to complainant during sex act—to effect that third party had given him information concerning complainant's sexual likes and dislikes—which remark, according to petitioner, caused complainant to become angry and to fabricate rape claim; by permitting petitioner to testify that he had said "something" that irked complainant and caused her to fabricate claim, trial court both allowed petitioner to meaningfully exercise his constitutional right to testify and also served interests protected by state rape shield law; petitioner's argument that testimony regarding substance of remark was admissible as res gestae of offense is rejected as being inconsistent with decision upholding rape shield statutes, *Michigan v. Lucas*, 500 U.S. 145, 59 LW 4443 (1990), and with modern trend recognizing res gestae as obsolete concept with no significance in federal constitutional law.

Question presented: Does application of Indiana rape shield statute, I.C. 35-37-4-4, to bar criminal defendant from testifying as to what occurred at time and place of alleged offense violate defendant's right to testify under Fourteenth, Fifth, and Sixth Amendments?

Petition for certiorari filed 4/6/94, by Robert G. Forbes, and Forcum and Forbes, both of Hartford City, Ind.

93-1633 SWAN v. PETERSON

Confrontation—Hearsay statements of child sex abuse victim—Indicia of reliability.

Ruling below (CA 9, 6 F.3d 1373):

Findings of state courts and federal district court that hearsay statements of victims of child sex abuse—offered for admission pursuant to state child sex abuse hearsay exception—were spontaneous, indicated sexual knowledge inappropriate for victims' young ages, and were made with no motive to lie are not clearly erroneous and support conclusion that children's hearsay statements bore indicia of reliability adequate to satisfy Sixth Amendment's Confrontation Clause as interpreted in *Idaho v. Wright*, 497 U.S. 805, 58 LW 5036 (1990); although both state courts and district court incorrectly engaged in bootstrapping by also considering fact that children's hearsay statements were consistent with prior statements, this reliance on consistency did not undermine courts' conclusions regarding reliability; argument that trial judge's finding that child witness was incompetent to testify barred later finding that child's hearsay statements could be sufficiently trustworthy for admission pursuant to child sex abuse hearsay exception was rejected in *Wright*; Confrontation Clause does not mandate threshold determination of credibility of reporters of statements admitted pursuant to child sex abuse hearsay exception; order denying petition for federal habeas corpus relief from state convictions of child sex abuse is affirmed.

Questions presented: (1) Could hearsay statements admitted pursuant to statutory hearsay exception that were made by two 3½-year-old children, who were ruled incompetent and, therefore, unable to testify at trial, be found to have particularized guarantees of trustworthiness based solely upon their consistency with prior statements, and if so, would this violate anti-corroboration bootstrapping prohibition of *Idaho v. Wright* and Sixth Amendment? (2) Did court below fail to follow this court's decision in *Wright* when it found child hearsay statements describing sexual abuse to be trustworthy based solely upon consistency of these statements with other statements? (3) In case in which child makes concededly false accusation of abuse to detective and prosecutor in context of investigation, should this be considered in calculation of whether her other hearsay statements were trustworthy? (4) In case in which finding of incompetence to testify is based on young child's inability to speak truthfully, can finding that her earlier statements, made when she was only 3½ years old, possess particularized guarantees of trustworthiness required by *Wright*, be sustained? (5) Is admission of hearsay statements made by two 3½-year-old children, who did not testify at trial, violative of Confrontation Clause, in case in which reporters of hearsay were predisposed to find sexual abuse, in which successive hearsay statements that were admitted were made over period of six months after initial disclosure, and in which children had been tainted by earlier interviews? (6) Is Sixth Amendment's Confrontation Clause violated in case in which criminal defendant is convicted solely on basis of hearsay testimony?

Petition for certiorari filed 4/18/94, by David Allen, Todd Maybrown, Richard Hansen, and Allen, Hansen & Maybrown, all of Seattle, Wash.

WILLIAM ORR SWAN; KATHLEEN ROLAND SWAN, Petitioners-Appellants, v. KURT S. PETERSON, Warden of Washington Correctional Center; ELDON AIL, Warden of Washington Correctional Center for Women; CHASE RIVELAND, Secretary of Department of Corrections, Respondents-Appellees.

SWAN v. PETERSON

No. 92-35493

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 6 F.3d 1373; 1993 U.S. App. LEXIS 25517; 93 Cal. Daily Op. Service 7465; 93 Daily Journal DAR 12722

August 2, 1993, Argued, Submitted, Seattle, Washington
October 6, 1993, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-90-965-WTM. Walter T. McGovern, Senior District Judge, Presiding.

COUNSEL: David Allen, Allen & Hansen, Seattle, Washington, for the petitioners-appellants.

Charles R. Nesson, Cambridge, Massachusetts, Amicus Curiae, in support of the petitioners-appellants.

Paul D. Weisser, Assistant Attorney General, Olympia, Washington, for the respondents-appellees.

JUDGES: Before: Eugene A. Wright, Robert R. Beezer and Cynthia Holcomb Hall, Circuit Judges.

WRIGHT, Circuit Judge:

When the crime is child sexual abuse, one of the more difficult to detect and prosecute, a conviction hinges often on the words of children. What makes this case troubling is that the children did not testify at trial. On the basis of hearsay statements, supported by minimal corroborating evidence at best, a state jury convicted William and Kathleen Swan of sexually abusing their three-year-old daughter and her friend. The Swans have exhausted their state court remedies and appeal the district court's denial of their habeas corpus petition.

Our main issue is whether admission of the children's hearsay statements violated the Swan's Sixth Amendment Confrontation Clause rights. The Swans also argue that the state withheld information that a key reporting witness had once been sexually abused, that newly discovered medical evidence indicated that their daughter was not molested and that they received ineffective assistance of counsel. We affirm the dismissal of the habeas petition.

I. BACKGROUND

The sexual abuse charges stemmed from statements made by the Swans' daughter, B.A., and her three-year-old friend, R.T., to day-care center workers. The two children attended a day-care facility managed by Cindy Bratvold. She had hired Lisa Conradi as the center's new part-time assistant. The disturbing allegations arose on Conradi's second day of work. She told B.A. to keep her dress covered over her tights, reminding her that no one

should look at or touch her "private parts." Conradi said that B.A. responded "Uh-huh, Mommy and Daddy do." After further questioning, the child allegedly told Conradi about games with her parents involving sexual acts.

Conradi alerted Bratvold, who called Child Protective Services, a state agency. Bratvold then spoke with B.A., who allegedly told her that the games sometimes included her friend, R.T. Two CPS caseworkers arrived and talked with B.A., but the interview was inconclusive. They ended it when Kathleen Swan arrived to take her daughter home.

R.T. came to the center the next day, but B.A. did not. Bratvold asked R.T. about the Swans and what types of games they played together. R.T. allegedly described activities similar to what B.A. had disclosed, including genital touching and oral sex.

These initial statements to the day-care workers were the most damaging. The Washington Supreme Court reviewed in detail the trial testimony about these events. State v. Swan, 114 Wash. 2d 613, 790 P.2d 610, 616-618 (Wash. 1990), cert. denied, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991). We need not repeat those findings, except to say that the implications are grave and alarming. The children demonstrated precocious sexual knowledge, describing multiple episodes of abuse by the Swans, which, if believed by a jury, would warrant conviction.

After interviews with a CPS caseworker, the police were called and the children placed in protective custody. The state charged both Swans with two counts of statutory rape. Superior Court Judge Ellington conducted pretrial hearings to determine whether the young girls were competent to testify. After observing them, the judge concluded that, because of their youth and inability to answer questions in court, they could not satisfy the competency requirements. The Swans do not contest this ruling.

The state introduced the children's statements to the day-care workers under Washington's statutory child sexual abuse hearsay exception, RCW § 9A.44.120.[1] Under the same exception, the state introduced other disputed hearsay evidence, including the children's disclosures to the caseworker, B.A.'s statements to her foster mother and R.T.'s statements to her father and a police detective.

Before the admission of each statement, Judge Ellington, assisted by counsel, conducted extensive preliminary examinations of the reporting witnesses outside the presence of the jury. Once satisfied that a statement met the reliability and corroboration requirements of the statutory exception, the court allowed it into evidence. The jury returned guilty verdicts.

The Washington Court of Appeals reversed, holding that the statements lacked sufficient corroboration as required by the hearsay statute. The State Supreme Court disagreed and reinstated the convictions.

The Swans petitioned the district court for a writ of habeas corpus, arguing that: (1) the admission of the hearsay statements violated the Confrontation Clause; (2) the state withheld favorable Brady evidence; namely, that day-care worker Conradi had been sexually abused; (3) newly discovered evidence showed that their daughter's hymen is intact; and (4) they received ineffective assistance by retained counsel. The court adopted the Report and Recommendation of the magistrate judge and denied the petition on summary judgment.

II. ANALYSIS

CONFRONTATION CLAUSE

A. Standard of Review and the Presumption of Correctness

We begin our analysis mindful that this is a habeas corpus proceeding, not direct review of a criminal conviction. The Swans have already had the opportunity to litigate their claims in the state courts. Washington's highest court upheld their convictions. Different principles apply on collateral review, constraining the role of a federal appellate court. As the Supreme Court recently reminded us, we may not second-guess the state courts:

> Direct review is the principal avenue for challenging a conviction. "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials."

Brecht v. Abrahamson, 123 L. Ed. 2d 353, 113 S. Ct. 1710, 1719 (1993) (quoting Barefoot v. Estelle, 463 U.S. 880, 887, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983)).

We review de novo the decision to deny the habeas petition and, to the extent we need to review the district court's factual findings, the clearly

erroneous standard applies. Hendricks v. Zenon, 993 F.2d 664, 668 (9th Cir. 1993).

Under 28 U.S.C. § 2254(d), we accord a presumption of correctness to the state courts' factual findings. But this presumption does not apply to the state courts' resolution of mixed questions of law and fact. Acosta-Huerta v. Estelle, 954 F.2d 581, 585 (9th Cir. 1992). Whether the hearsay statements were sufficiently reliable to be admitted without violating the Confrontation Clause is a mixed question. See United States v. Owens, 789 F.2d 750, 757-58 (9th Cir. 1986) (admission of hearsay statement by assault victim who later suffered memory loss), rev'd on other grounds, 484 U.S. 554, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988); see also Myatt v. Hannigan, 910 F.2d 680, 685 (10th Cir. 1990) (hearsay declarations of child sexual abuse victim).

Consequently, we accord deference to the state courts' factual findings regarding the timing, manner and circumstances of the hearsay statements. We review de novo the ultimate determination that the Swans' Confrontation Clause rights were not violated.

B. Sufficient Indicia of Reliability

The Confrontation Clause and the hearsay rule are not coextensive. Although both protect similar values, each sets independent prohibitions on admissibility. See Ohio v. Roberts, 448 U.S. 56, 62-65, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980). The Clause does not necessarily bar the admission of hearsay statements. Most evidence that falls under a recognized hearsay exception may be admitted without confrontation because of its presumed trustworthiness. But the Clause may prohibit introducing some evidence that otherwise would be admissible under a hearsay exception. Idaho v. Wright, 497 U.S. 805, 813-14, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990).

A statement falling under an exception will also be admissible under the Clause if the prosecution demonstrates the unavailability of the declarant and that the statement bears adequate "indicia of reliability." Roberts, 448 U.S. at 66.

The Swans do not contest the trial court's determination that the children were incompetent to testify and "unavailable" for hearsay purposes.[2] The crux of this appeal is whether the incriminating statements bore sufficient "indiciation of reliability" to withstand scrutiny under the Clause.

The reliability requirement is satisfied if a statement falls within a "firmly rooted hearsay exception" or if it is supported by "a showing of particularized guarantees of trustworthiness." Wright, 497 U.S. at 818. The trial court admitted the statements under Washington's child sexual abuse hearsay exception. Enacted in 1982, this exception is relatively new and not firmly rooted.

As the statements were admitted under a nontraditional exception, the state, as proponent of the evidence, had the burden to demonstrate reliability by showing "particularized guarantees of trustworthiness." The proof is based on consideration of the totality of the circumstances but "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." Id. at 819.

The Supreme Court, in Wright, identified several factors bearing on the reliability of a child's hearsay statements: (1) spontaneity and consistent repetition; (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of motive to fabricate. Id. at 821-22 (citing cases). But no mechanical test prevails and "courts have considerable leeway in their consideration of appropriate factors." Id. at 822.[3]

Despite this latitude, other corroborating evidence may not be considered in assessing the hearsay's reliability. This would permit "admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial." Id. at 823. It also presents dangers because of the problem of selective reliability.[4]

C. Initial Statements About Abuse

1. Relevant factors and impermissible bootstrapping

We consider first the girls' initial statements to the day-care workers. In evaluating the admissibility of these remarks, the trial court made three reliability findings of the type explicitly approved by the Court in Wright: (1) neither girl had a motive to lie; (2) both girls described sexual acts in specific terms, using age-appropriate language; and (3) most of the statements were spontaneous responses to open-ended questions or to no questions at all. The court also found that the girls had a reputation for truthfulness and that the disclosures were made to adults who had relationships of trust with the girls. These latter factors do not seem inappropriate, given Wright's emphasis that trial courts have considerable leeway in making reliability determinations.

But the court relied improperly upon one additional factor. It observed that the girls "made the statements on two consecutive days without the

children having discussed the matter and giving basically the same content to the statements, I think is a strong indicator of reliability." This is impermissible bootstrapping as the court referenced other evidence in finding cross-corroboration of each child's statements.[5] "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess **indicia** of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." Id. at 822 (emphasis added).

We do not analyze separately the findings of the Washington Supreme Court as it agreed generally with the trial court's determinations. See Swan, 790 P.2d at 628-630. The district court conducted an independent review of the transcripts. It agreed with the state courts that (1) the statements were spontaneous; (2) neither girl had a motive to lie; (3) they did not have a tendency to lie; and (4) most significant to the district court, the statements included "a description of oral intercourse which was so specific, and showed such inappropriate and precocious knowledge, that it would be difficult to see this knowledge as anything other than the result of personal experience."

But the court also made the same bootstrapping mistake as did the state courts. It found relevant that "the allegations made by the girls were consistent, both with one another's reports and with each girl's later reports of the same activities." (emphasis added).

Nevertheless, we do not conclude that the bootstrapping errors of the state courts and the district court tainted their reliability determinations. Neither the state courts nor the district court indicated that cross-corroboration was a primary reason for finding the statements reliable; indeed, the district court found most significant the knowledge of sexual acts unexpected of children of that age.

2. Spontaneity

We turn next to the other reliability findings. In particular, the Swans dispute that the statements were spontaneous. They say that the day-care workers prompted the girls' initial remarks. According to her preliminary testimony, Conradi told B.A. that no one should touch her private parts and the girl responded "Mommy and Daddy do." Although this statement did not come out of the blue, it was not made in response to any question posed by Conradi. Other statements made by B.A. at that time seemed impulsive, such as when, while playing a game of peekaboo, the girl said that "My daddy puts his penis in my mouth and icky milk comes out."

Similarly, R.T.'s statements were made in response to Bratvold's open-ended questions, such as "What kinds of games do you play with Bill [Swan]?" This contrasts with the leading questions the Supreme Court criticized in Wright. See 497 U.S. at 810 ("Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?").[6] We find no clear error in the state and district courts' spontaneity determinations.

3. No motive or tendency to lie

We also find no clear error in the finding that the girls had no motive to lie. The Swans do not suggest any motive. They contend instead that the day-care workers, and particularly Conradi, were biased. That, however, does not suggest that the girls themselves had a reason to lie.

Next, the Swans argue that the courts erred in finding that the girls were generally not prone to lie. They note that R.T.'s father testified that she occasionally had make-believe companions and pretended to have gone somewhere the day before when she had not. And she told the police that "Jerry," possibly a reference to her father Gerald, put "marbles" in her genital area. She said that she had related the same information to Bratvold, who denied that R.T. had made such a statement to her.

The testimony of R.T.'s father is not dispositive. Children pretend. This does not reveal a tendency to prevaricate. R.T.'s later statement about "Jerry" suggests a possible problem with lying. Whether the Swans may rely on a later statement to undermine the reliability of R.T.'s earlier statements, however, is unclear. Wright forbids using other corroborating evidence at trial to show that an initial hearsay statement is reliable. The issue here is subtly different: can arguably noncorroborating evidence be used to demonstrate the unreliability of a hearsay statement? Wright's caution against reference to other evidence at trial suggests not.[7]

Regardless, the district court considered this later statement but discounted it. The court reasoned that the accusation was ambiguous and that, by that time, several adults had questioned R.T. and the spontaneity surrounding her answers had faded. This determination was not clearly erroneous.

4. Effect of child declarant's incompetence

The Swans say that R.T.'s faulty performance at the competency hearing precludes a finding that her hearsay statements had sufficient guarantees of trustworthiness.[8]

The Supreme Court rejected a similar argument in Wright. Id. at 825 ("the Confrontation Clause does not erect a per se rule barring admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial"). The Swans would distinguish Wright, arguing that there the trial court found the child incapable only of communicating to the jury but here the incompetency problems were broader and more damaging.

The trial court recognized the distinction between R.T.'s ability to testify in a courtroom setting and to tell the truth at the time of the declarations. It clearly considered her incompetent only as to the former. We defer to its finding.

5. Credibility of the reporting witness

The Swans say that the statements were unreliable because the day-care workers, especially Conradi, were predisposed to find child abuse. Amicus supports this position. Amicus essentially makes a policy argument that in cases involving nontraditional hearsay exceptions, the trial court should be vigilant in assessing reliability by making a preliminary evaluation of the reporting witness' credibility. Whatever the merits of this view, a federal habeas court may not prescribe evidentiary rules for the states. We may grant relief only if there is serious constitutional error.

We do not read the Confrontation Clause as mandating a threshold assessment of the reporting witness's credibility before the admission of hearsay evidence. The Supreme Court has limited the reliability inquiry required by the Clause to whether the circumstances surrounding the making of the statement "render the declarant particularly worthy of belief." Id. at 820 (emphasis added). Unlike the declarant, the reporting witness is subjected to cross-examination and the requirements of an oath. See United States v. Hinkson, 632 F.2d 382, 385 (4th Cir. 1980) (discussing trustworthiness requirement included in the analogous residual hearsay exception, Fed. R. Evid. 803(24)). See also John E.B. Myers, Evidence in Child Abuse and Neglect, § 7.45, at 249, 262, 264 (2d ed. 1992) (reporting witness' credibility not a reliability factor that surrounds the making of the statement). The jury, not the trial judge, must weigh the reporting witness's credibility.

Obviously the trial court must make some inquiries, such as deciding whether a witness is competent to testify. But the Confrontation Clause does not require the court to take basic credibility determinations from the jury.

D. Later Hearsay Statements

1. Statements to CPS caseworker

In admitting the girls' statements to the CPS caseworker, the trial court found indicia of reliability because (1) more than one person was present when the statements were made; (2) some responses were spontaneous; (3) neither girl had a motive to lie and they had relationships of trust with the adults. It noted that leading questions had been asked of B.A. but concluded that direct questions are sometimes appropriate for difficult child witnesses and that the girl's answers were consistent with her other spontaneous statements. The district court agreed with these findings.

Although we are troubled by the use of leading questions,[9] this does not necessarily render B.A.'s responses untrustworthy. See United States v. George, 960 F.2d 97, 100 n.2 (9th Cir. 1992); Myers, supra, § 4.5 at 229-239. The consistency of the girl's statements with her earlier statements is the critical reliability factor here. We conclude that it provided a particularized guarantee of trustworthiness.

2. Statements to R.T.'s father and to police detective

These statements had a low level of reliability because, when allegedly made, several adults had already questioned the girls. But we agree with the district court that any error in admitting the statements was harmless because the evidence was "insignificant in impact when compared to the initial disclosures of the girls, and did not add anything new."

3. Statements to B.A.'s foster mother

In admitting this hearsay evidence, the trial court found indicia of reliability because (1) B.A. had no motive to lie; (2) she had the character for truthfulness; and (3) the statements were "basically spontaneous." The district court made similar findings.

The spontaneity of the statements is questionable. They occurred some five months after B.A.'s initial disclosure and after many interviews. We are not persuaded by the district court's reasoning that attention surrounding the earlier allegations had faded. Among other things, B.A. had been seeing a therapist and doubtless was asked about the earlier events, even if indirectly.

But again the critical factor is the consistency of the statements with B.A.'s earlier allegations. Under the totality of the circumstances,

we find that it provided an adequate sign of reliability.

SUFFICIENCY OF THE EVIDENCE

Amicus argues that "a criminal defendant cannot be convicted on the basis of hearsay alone." Even if hearsay can pass the admissibility threshold, says Professor Nesson, it is inherently deficient, without other corroborating evidence, for reaching a conclusion of guilt beyond a reasonable doubt.

We decline to address this argument because it is raised for the first time on appeal and not by the Swans. Although they challenged properly the sufficiency of the evidence in the trial court by a motion to dismiss at the close of the evidence, they did not raise this issue in their habeas petition.

Generally, we do not consider on appeal an issue raised only by an amicus. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1581 n.9 (9th Cir. 1986) (amicus may not frame the issues for appeal); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982) (same). Discretionary exceptions exist where a party attempts to raise the issue by reference to the amicus brief. See United States v. Van Winrow, 951 F.2d 1069, 1072 (9th Cir. 1991); Toussaint v. McCarthy. 801 F.2d 1080, 1106 n.27 (9th Cir. 1986), cert. denied, 481 U.S. 1069, 95 L. Ed. 2d 871, 107 S. Ct. 2462 (1987). And we have reached the issue where it involves a jurisdictional question or touches upon an issue of federalism or comity that could be considered sua sponte. See Stone v. City and County of San Francisco, 968 F.2d 850, 855-56 (9th Cir. 1992) (federalism and comity), cert. denied, 122 L. Ed. 2d 358, 113 S. Ct. 1050 (1993); Miller-Wohl Co. v. Commissioner of Labor and Industry, 694 F.2d 203, 204 (9th Cir. 1982) (jurisdiction); Chadha v. INS, 634 F.2d 408, 411-12 (9th Cir. 1980) (same), aff'd, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983).[10]

The Swans did not adopt amicus' argument by reference in their brief and none of the other exceptions apply. The issue has been waived.[11]

BRADY VIOLATION

The Swans contend that the state violated their due process rights when it suppressed evidence that Conradi, the day-care worker who was the key reporting witness, had been sexually abused. The district court rejected this contention without a hearing. It found no evidence that the state knew Conradi had been sexually abused, and concluded that this was not a material fact of exculpatory value.

During a pretrial deposition, defense counsel asked Conradi whether she had ever been abused. The prosecutor advised her not to answer unless relevancy could be shown. No attempt was made either to show relevancy or to require an answer to the question. The Swans argue that the prosecutor's advice demonstrates that the state knew of Conradi's past victimization or, at least, that the court should have granted an evidentiary hearing to determine whether the prosecutor knew, but did not disclose, that she had been abused.

The Swans were entitled to an evidentiary hearing only if they alleged facts that, if proved, would entitle them to relief and if they did not receive a full and fair evidentiary hearing in the state court. See Greyson v. Kellam, 937 F.2d 1409, 1412 (9th Cir. 1991). We review for an abuse of discretion the decision to deny an evidentiary hearing. Id.

The government must disclose evidence favorable to a defendant and material to either guilt or punishment. United States v. Streit, 962 F.2d 894, 900 (9th Cir.) (citing United States v. Bagley, 473 U.S. 667, 674, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985) and Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)), cert. denied, 113 S. Ct. 431 (1992). Evidence is "material" only if a reasonable probability exists that, had it been disclosed, the result would have been different. United States v. Kennedy, 890 F.2d 1056, 1058 (9th Cir. 1989), cert. denied, 494 U.S. 1008, 108 L. Ed. 2d 484, 110 S. Ct. 1308 (1990). Evidence undermining the credibility of a government witness must be disclosed when the reliability of the witness may be determinative of the defendant's guilt or innocence. United States v. Brumel-Alvarez, 991 F.2d 1452, 1458 (9th Cir. 1993).

The defense learned of the abuse from a post-trial interview of Conradi conducted by a defense investigator posing as a journalist. In the interview, Conradi said that she saw abuse everywhere in her neighborhood. She also claimed to have called Child Protective Services and "turned in at least 20 kids," who were abusing other children.

Although information about Conradi's abuse was not before the jury, it heard similar evidence undermining her credibility. She testified that her own children had been sexually abused and that she took a seminar to learn more about the subject, in part, because of their experience. During cross-examination, she admitted that she saw evidence of abuse "everywhere." On redirect, she clarified the statement by saying that she meant that child sexual abuse can be found in all social strata.

Both defense attorneys argued in closing that she was predisposed to find sexual abuse because of her personal experience with it.

The jury knew that Conradi's children were sexually abused and heard argument that she was biased as a result. But apparently it credited her testimony. There is no reasonable likelihood that additional evidence of Conradi's own abuse would have altered the verdict.

NEWLY DISCOVERED EVIDENCE

Almost five years after the trial, Dr. Richard Soderstrom conducted a routine gynecological examination of B.A. The Swans argue that his findings, that she had a normal, intact hymen and that her introital opening (the opening into the vagina) could not previously have been 1 to 1.2 centimeters, constitutes newly discovered evidence justifying a new trial. They add that the evidence presented at trial regarding this issue was false and they were denied due process.

Newly discovered evidence is a ground for federal habeas corpus relief only when it bears on the constitutionality of an applicant's conviction, Herrera v. Collins, 122 L. Ed. 2d 203, 113 S. Ct. 853, 860 (1993), and would "'probably produce an acquittal,'" Harris v. Vasquez, 949 F.2d 1497, 1523 (9th Cir. 1990) (inner quotation omitted), cert. denied, 117 L. Ed. 2d 501, 112 S. Ct. 1275 (1992).

We agree with the state that this new evidence is insignificant. The Swans were convicted of the statutory rape of R.T. even though physical evidence of sexual abuse as to her was nonexistent. The convictions were based upon the evidence of oral sex,[12] which was substantially the same for B.A. as for R.T.

True, the jury may have convicted the Swans of raping B.A. based upon the physical evidence, but convicted them of raping R.T. because her out-of-court statements paralleled those of B.A. But even under this unlikely scenario, evidence about the intact hymen probably would not have produced an acquittal.

Nurse Practitioner Theodore Ritter said that when he examined B.A. he did not notice the presence or absence of the hymen. He said, however, that ordinarily an examiner cannot see into the vagina due to the presence of the hymen, but that he was able to see into B.A.'s vagina. He estimated that her introital opening was 1 to 1.2 centimeters, though he did not measure it. Another state witness, Dr. Carol Jenny, testified that Ritter's observations meant only that Ritter could see through the hymenal opening, and that an accurate measurement of the vaginal introitus is obtainable only with a measuring device, which Ritter did not use.

Dr. Lawrence Parris also testified for the state. He said that he examined B.A. and found no evidence of physical injury to her genitalia. He also said that he did not notice the presence or absence of a hymen.

Contrary to the Swans' contentions, the newly discovered evidence does not contradict materially the evidence presented at trial. At most, it could have been used to impeach Ritter's testimony concerning the size of the introital opening. It does not demonstrate that the state's evidence was false. It was merely equivocal.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Swans argue that their trial attorneys' failure to discover that the state's medical evidence regarding B.A. was false constitutes ineffective assistance of counsel.

They must show deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687-90, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In light of our conclusion that the new medical evidence would not with reasonable likelihood have altered the result, the Swans cannot show prejudice. Their ineffective assistance claim fails.

AFFIRMED.

ENDNOTES

1. At the time, RCW § 9A.44.120 read:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings . . . if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceeding; or
>
> (b) Is unavailable as a witness: Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

2. We have no reason to decide whether White v. Illinois, 116 L. Ed. 2d 848, 112 S. Ct. 736, 741 (1992), limits the unavailability requirement to cases involving the admission of prior testimony.

3. The Washington Supreme Court has identified a similar list of factors bearing on the reliability of a child sexual abuse victim's hearsay statements. State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197, 205 (Wash. 1984); State v. Parris, 98 Wash. 2d 140, 654 P.2d 77, 80 (Wash. 1982).

4. For example, corroboration of a child's allegations of sexual abuse by medical evidence may tend to show that abuse occurred but it sheds no light on the allegations of the identity of the abuser. A jury might rely on the partial corroboration to mistakenly infer the trustworthiness of the entire statement. Wright, 497 U.S. at 824.

5. The court probably emphasized other corroborating evidence because of the requirements of the Washington child sexual abuse hearsay statute. It requires a trial court to make separate determinations of reliability and corroboration before admitting a hearsay statement when the child is unavailable to testify. Swan, 790 P.2d at 615. The trial court did not make separate determinations but instead apparently blended the inquiries. Id. at 616.

6. Somewhat troubling is Bratvold's admission that she began to cry upon hearing R.T.'s allegations about Kathy Swan, but continued interviewing the girl. This at least raises the question whether the day-care worker's change in demeanor may have, in a subtle way, prompted R.T.'s additional statements. Cf. Wright, 497 U.S. at 826-827 (if there "is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness"). Bratvold was not trained professionally to interview child sexual abuse victims. But we decline to speculate endlessly from a cold reading of the record. We defer to the trial court's conclusions that Bratvold did not direct the girl's answers.

7. Because Wright holds that the consistency of a child witness's allegations bears on the reliability of an initial hearsay statement, arguably a later inconsistent statement should also be evaluated in making the reliability determination. This does not mean, however, that R.T.'s later allegation undermines the reliability of her earlier statements. The statement about "Jerry" was not necessarily inconsistent because it may have referred to entirely different events than those involving the Swans.

8. Among other remarks, R.T. said that she had been in the courtroom 40 times (she had never been there before), she had seen defense counsel four days earlier (she had not) and her dress was "blue, sort of, but it's pink" (it was blue).

9. See, e.g., Wright, 497 U.S. at 826; Stephen Ceci & Maggie Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychol. Bull. 403 (1993); Daniel Goleman, Studies Reveal Suggestibility of Very Young as Witnesses, N.Y. Times, June 11, 1993, at A1, A9.

10. In United States v. Sherbondy, 865 F.2d 996 (9th Cir. 1988), an anomalous case, we addressed an issue raised on appeal only by an amicus. We did so because the issue was purely legal and involved interpretation of a new statute. Id. at 1001 n.8. But the authority Sherbondy relied upon concerned only when a party, as opposed to an amicus, may raise an issue for the first time on appeal. See Abex Corp. v. Ski's Enters., Inc., 748 F.2d 513, 516 (9th Cir. 1984).

11. We also note that whether the Swans' convictions rested on hearsay alone is unclear. The Washington Supreme Court found the medical evidence regarding B.A. and also, to a lesser extent, R.T.'s play with an anatomically correct doll, somewhat corroborative. See Swan, 790 P.2d at 624.

12. The statute under which the Swans were convicted, former RCW § 9A.44.070, defined sexual intercourse to include oral sex.

93-7659 HARRIS v. ALABAMA

Death sentence—Disregard of jury recommendation—Absence of standards for court's discretion.

Ruling below (Ala SupCt, 632 So.2d 543):

Sentence of death by electrocution, imposed on capital murder defendant by trial judge despite jury's recommendation of life without parole, is affirmed.

Questions presented: (1) Is death sentence invalid when trial court overrides constitutionally protected jury verdict of life without parole and imposes death, when court relies on no norm or standard for limiting its discretion to override and when it gives no reason as to why jury verdict is improper? (2) Does capital sentencing scheme in which trial courts are free to reject jury life-without-parole verdicts without regard to any articulated standard or norm, and in which rejection of those verdicts results in haphazard and inconsistent application of death penalty, violate Eighth Amendment?

Petition for certiorari filed 1/26/94, by Bryan A. Stevenson, of Montgomery, Ala., and Ruth E. Friedman, of Atlanta, Ga.

In forma pauperis and certiorari granted 6/27/94. See 62 LW 3860.

Ex parte Louise Harris (In re: Louise Harris v. State of Alabama) Ex parte Harris

1920374

SUPREME COURT OF ALABAMA

632 So. 2d 543; 1993 Ala. LEXIS 589

June 25, 1993, Released

SUBSEQUENT HISTORY: Released for Publication January 3, 1994.

PRIOR HISTORY: PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS. H. Randall Thomas. (Montgomery Circuit Court, CC-88-1237; Court of Criminal Appeals, 3 Div. 332). H. Randall Thomas, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For Petitioner: Ruth E. Friedman, Atlanta, Georgia; and Bryan A. Stevenson, Montgomery.

For Respondent: James H. Evans, atty. gen., and Sandra J. Stewart, deputy atty. gen.; and Robert E. Lusk, Jr., asst. district atty.

For Petitioner: Ruth E. Friedman, Atlanta, Georgia; and Bryan A. Stevenson, Montgomery.

For Respondent: James H. Evans, atty. gen., and Sandra J. Stewart, deputy atty. gen.; and Robert E. Lusk, Jr., asst. district atty.

JUDGES: HOUSTON, Hornsby, Maddox, Shores, Almon, Adams

OPINION: HOUSTON, JUSTICE.

This is a capital murder case. A detailed statement of the facts appears in the opinion of the Court of Criminal Appeals, Harris v. State, 632 So. 2d 503 (Ala.Cr.App. 1992).

Louise Harris was convicted of capital murder; the jury recommended a sentence of life imprisonment without parole. The trial court overrode the jury's recommendation and sentenced Harris to death by electrocution. Judge Bowen, writing for the Court of Criminal Appeals, affirmed Harris's conviction with a lengthy opinion, from which Judge Montiel dissented. The Court of Criminal Appeals overruled Harris's application for rehearing and denied her Rule 39(k), Ala.R.App.P., motion, without opinion. We then granted certiorari review pursuant to Rule 39(c), Ala.R.App.P.

Having carefully read and considered the record, together with Harris's 141-page brief, the state's 237-page brief, and Harris's 18-page reply brief, we conclude that the Court of Criminal Appeals correctly resolved the issues discussed in its opinion. We do note, however, the issue on which Judge Montiel dissents -- whether Harris had an absolute right to be present at "all pretrial proceedings relating to [her] case" (i.e., proceedings involving questions of law, questions of procedure, or questions regarding the removal of Harris's counsel), pursuant to the guarantees of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution and because every criminal defendant, particularly a defendant in a capital murder case, has the fundamental right to participate in the preparation of her defense. Suffice it to say, without further discussion, that after thoroughly reviewing the record and the applicable law, we are satisfied that the Court of Criminal Appeals adequately addressed and correctly resolved this issue.

We note also that Harris has raised in this Court several issues that were either not presented to or not addressed by the Court of Criminal Appeals. Because this Court may consider any issue in a capital case concerning the propriety of the conviction and the death sentence, and, more

importantly, because a person's life hangs in the balance, we have fully considered each of the additional issues Harris has raised. Furthermore, we have independently searched the record for error, as did the Court of Criminal Appeals. However, after carefully researching the applicable law and after exhaustively scouring the record for error, we find no reversible error in the proceedings below.

We do feel, however, that the following issue, raised by Harris in this Court, warrants further discussion: Whether the absence of a full transcript of the voir dire examination of the jury and all bench conferences denied Harris a fundamentally fair trial in violation of state law and in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and thus constituted reversible error.

Harris bases her argument on Rule 19.4(a), Ala.R.Crim.P., which requires:

> "In all capital cases (criminal trials in which the defendant is charged with a death penalty offense), the court reporter shall take full stenographic notes of voir dire of the jury and of the arguments of counsel, whether or not such is ordered by the judge or requested by the prosecution or defense. This duty may not be abrogated by the judge or waived by the defendant." (Emphasis added.)

This case was commenced before the adoption of Rule 19.4; therefore, Rule 19.4 is not applicable in this case. Rather, Temporary Rule 21, Ala.Temp.R.Crim.P., governs this case; it read, in part, as follows:

> "(a) In all capital cases (criminal cases in which the defendant is charged with a death penalty offense), the court reporter shall take full stenographic notes of the arguments of counsel whether or not such is ordered by the judge or requested by the prosecution or defense. This duty may not be abrogated by the judge or waived by the defendant." (Emphasis added.)

Under Temporary Rule 21(a), there was no requirement that the voir dire examination of the jury be stenographically recorded; and the requirement that the court reporter take "full stenographic notes" of "the arguments of counsel" -- which appeared in Temporary Rule 21(a) and also appears in the current Rule 19.4(a) -- does not require the court reporter to transcribe every incidental discussion between counsel and the trial judge that occurs at the bench unless counsel so requests or the court so directs. Instead, the phrase "arguments of counsel" refers to opening and closing arguments of counsel. See, e.g., Ex parte Godbolt, 546 So. 2d 991 (Ala. 1987); Webb v. State, 539 So. 2d 343 (Ala.Crim.App. 1987); Reeves v. State, 518 So. 2d 168 (Ala.Crim.App. 1987); see Ala. Code 1975, § 12-17-275.

In this case, the items or statements omitted from the record were not transcribed because they occurred out of the hearing of the court reporter. However, Harris's trial counsel had moved the trial court to "order the official court reporter to record and transcribe all proceedings in all phases [of the case], including pretrial hearings, legal arguments, voir dire and selection of the jury, in-chambers conferences, any discussions regarding jury instructions, and all matters during the trial and in support thereof ..."; and the court had granted the motion. After granting the motion, the court had the duty to see that the entire proceedings were transcribed; we must conclude that the failure to record and transcribe a portion of the voir dire examination of the jury and certain portions of the bench conferences, in light of the fact that Harris was represented on appeal by counsel other than the attorney at trial, constituted error. See Ex parte Godbolt, 546 So. 2d 991 (Ala. 1987).[1] Thus, the question becomes whether that error constituted reversible error.

> "'When, [as in this case], a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal. The wisdom of this rule is apparent. When a defendant is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. Indeed, counsel's obligation to the court alone would seem to compel him to initiate such disclosure. The attorney, having been present at trial, should be expected to be aware of any errors or improprieties which may have occurred during the portion of the proceedings not recorded. But when a defendant is represented on appeal by counsel not involved at trial [as in this case], counsel cannot reasonably be expected to show specific prejudice. To be sure, there may be some instances where it can readily be determined from the balance of the record whether an error has been made during the

> untranscribed portion of the proceedings. Often, however, even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the proceedings were not being recorded. In such a case, to require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to [have the reviewing court] notice plain errors or defects....
>
> "'We do not advocate a mechanistic approach to situations involving the absence of a complete transcript of the trial proceedings. We must, however, be able to conclude affirmatively that no substantial rights of the appellant have been adversely affected by the omissions from the transcript. When ... a substantial and significant portion of the record is missing, and the appellant is represented on appeal by counsel not involved at trial, such a conclusion is foreclosed....'"

Ex parte Godbolt, 546 So. 2d at 997. (Citations omitted; emphasis added.) (Quoting with approval United States v. Selva, 559 F.2d 1303, 1305-06 (5th Cir. 1977)).

We have carefully reread those portions of the record where each omission occurred and have reread the several pages before and the several pages after those omitted portions, to ascertain, if possible, the content and substance of the discussions not transcribed, so as to determine whether "a substantial and significant portion of the record" is missing and to determine whether we could "conclude affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript." Id.

From this extensive review, and given the particular facts of this case, we have concluded that the untranscribed portions of the proceedings did not constitute "a substantial and significant portion of the record" and we have "concluded affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript." Rather, we have concluded that the trial court's rulings related to certain omitted portions of the proceedings were adverse to the state and that the content or substance of the other discussions that occurred out of the hearing of the court reporter was general in nature and had no effect on the outcome of the case. We conclude, under the facts of this case, that the error in failing to ensure that the entire proceedings were transcribed was harmless. Therefore, Harris's conviction was properly affirmed.

We note for the Bench and Bar that our holding that the failure to ensure a complete transcript of the proceedings was harmless error is strictly limited to the facts of this case and to the record before us; we are not to be understood as holding that in all cases such an error will be considered harmless. Rather, each case will be limited to and determined on its own facts.

AFFIRMED.

Hornsby, C. J., and Maddox and Shores, JJ., concur.

Almon, J., concurs in the result.

Adams, J., dissents.

DISSENT: ADAMS, JUSTICE (dissenting).

I must respectfully dissent from the majority opinion. In my view, the defendant, under Alabama law as it has developed since Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), was entitled to require the prosecutor to explain the reasons for her peremptory challenges of black veniremembers. The venire consisted of 17 black members and 33 white members. During the selection process, the prosecutor challenged 12 of the black veniremembers with her 19 allotted peremptory strikes. Thus, she challenged 71% of the black veniremembers, but only 21% of the white veniremembers.

These facts, standing alone, are sufficient to raise an inference of discrimination, but the inference is further strengthened by an additional fact. As the Court of Criminal Appeals observed, this prosecutor "has a history of using peremptory challenges to discriminate against black jurors." Harris v. State, 632 So. 2d 503 (Ala. Crim. App. 1992) (quoting Hood v. State, 598 So. 2d 1022, 1024 (Ala. Crim. App. 1991)). "An example of what appears to be a systematic practice of discrimination is a relevant factor to be considered both at the trial level and on review in assessing the strength of the defendant's prima facie case." Ex parte Bird, 594 So. 2d 676, 681 (Ala. 1991).

Notwithstanding these factors, the Court of Criminal Appeals determined that the defendant had failed to present a prima facie case of racial discrimination in jury selection, and, consequently, that the prosecutor was not required to justify her challenges. That court's disposition of this issue is inexplicable and erroneous, as is this Court's majority opinion, which, sub silentio, concurs in that court's conclusion.

The readiness of the judiciary to guard against inroads into constitutional guarantees must not depend on its assessment of the merits of the underlying case. I cannot, therefore, justify the conclusion that the facts presented by the defendant do not require us to remand this cause for further proceedings at which the State would be required to explain its challenges. Consequently, I must respectfully dissent.

ENDNOTE

1. Neither Temporary Rule 21, Ala.Temp.R.Crim.P., nor Rule 19.4,Ala.R.Crim.P., was in effect when this Court decided Ex parte Godbolt. Nonetheless, the rationale of Ex parte Godbolt is applicable to the facts of this case.

93-1260 U.S. v. LOPEZ

Possession of firearm within 1,000 feet of school—Commerce Clause.

Ruling below (CA 5, 2 F.3d 1342, 62 LW 2173, 53 CrL 1533):

In absence of congressional findings regarding link to interstate commerce, federal statute that makes it crime to possess firearm within 1,000 feet of school, 18 USC 922(q), exceeds Congress' authority under Commerce Clause and is, therefore, unconstitutional; defendant's conviction of violating Section 922(q) is reversed.

Question presented: Does Commerce Clause empower Congress to enact Section 922(q), which makes it federal offense to possess firearm within 1,000 feet of school?

Petition for certiorari filed 2/2/94, by Drew S. Days III, Sol. Gen., Jo Ann Harris, Asst. Atty. Gen., William C. Bryson, Dpty. Sol. Gen., and Ronald J. Mann, Asst. to Sol. Gen.

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus ALFONSO LOPEZ, JR., Defendant-Appellant.

UNITED STATES v. LOPEZ

No. 92-5641

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2 F.3d 1342; 1993 U.S. App. LEXIS 23556

September 15, 1993, Decided

SUBSEQUENT HISTORY: Suggestion for Rehearing En Banc Denied November 10, 1993, Reported at: 1993 U.S. App. LEXIS 30449.

Certiorari Granted April 18, 1994, Reported at: 1994 U.S. LEXIS 2872.

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Texas. D.C. DOCKET NUMBER SA-92-CR-84-1. JUDGE H. F. Garcia

DISPOSITION: For the reasons stated, the judgment of conviction is reversed and the case is remanded with directions to dismiss the indictment. REVERSED

COUNSEL: For Plaintiff-Appellee: RONALD F. EDERER, USA, Richard L. Durbin, Jr., AUSA, San Antonio, TX.

For Defendant-Appellant: LUCIEN B. CAMPBELL, FPD, John R. Carter, AFPD, San Antonio, TX.

JUDGES: Before REAVLEY, KING and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

The United States Constitution establishes a national government of limited and enumerated powers. As James Madison put it in The Federalist Papers, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, at 292 (C. Rossiter ed. 1961). Madison's understanding was confirmed by the Tenth Amendment. It is easy to lose sight of all this in a day when Congress appropriates trillion-dollar budgets and regulates myriad aspects of economic and social life. Nevertheless, there are occasions on which we are reminded of this fundamental postulate of our constitutional order. This case presents such an occasion.

Proceedings Below

On March 10, 1992, defendant-appellant Alfonso Lopez, Jr., then a twelfth-grade student attending Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun. Based upon an anonymous tip, school officials confronted Lopez, who admitted that he was carrying the weapon. Although the gun was unloaded, Lopez had five bullets on his person. After being advised of his rights, Lopez stated that "Gilbert" had given him the gun so that he (Lopez) could deliver it after school to "Jason," who planned to use it in a "gang war." Lopez was to receive $40 for his services.

Lopez was charged in a one-count indictment with violating 18 U.S.C. § 922(q), which makes it illegal to possess a firearm in a school zone.[1] After pleading not guilty, Lopez moved to dismiss the indictment on the ground that section 922(q) "is unconstitutional, as it is beyond the power of Congress to legislate control over our public schools." His brief in support of the motion further alleged that section 922(q) "does not appear to have been enacted in furtherance of any of those enumerated powers" of the federal government. The district court denied the motion, concluding that section 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce." Lopez thereafter waived his

right to a jury trial and was tried to the bench upon stipulated evidence. The court found Lopez guilty and sentenced him to six months' imprisonment to be followed by two years' supervised release. Lopez now appeals his conviction and sentence. Lopez's sole objection to his conviction is his constitutional challenge to section 922(q); he does not otherwise contest his guilt. We now reverse.

Overview

So far as we are aware, the constitutionality of section 922(q), also known as "the Gun-Free School Zones Act of 1990," is a question of first impression in the federal courts.[2] Section 922(q)(1)(A) provides: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[3] Section 922(q)(1)(B) then carves out several limited exceptions, none of which are applicable here.[4] Section 922(q)(2) makes it illegal, again with some exceptions, to intentionally or recklessly discharge a firearm in a known school zone. Section 922(q)(3) disclaims any intent on the part of Congress to preempt state law. Violations are punishable by up to 5 years' imprisonment and a $ 5,000 fine. 18 U.S.C. § 924(a)(4).

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." Gregory v. Ashcroft, 115 L. Ed. 2d 410, 111 S. Ct. 2395, 2399 (1991). Justice O'Connor's observation is particularly apt in the context of this case, which pits the states' traditional authority over education and schooling against the federal government's acknowledged power to regulate firearms in or affecting interstate commerce. Lopez argues that section 922(q) exceeds Congress' delegated powers and violates the Tenth Amendment.[5] The government counters that section 922(q) is a permissible exercise of Congress' power under the Commerce Clause.[6] In actuality, the Tenth Amendment and Commerce Clause issues in this case are but two sides of the same coin. As Justice O'Connor has explained:

> "In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."

New York v. United States, 120 L. Ed. 2d 120, 112 S. Ct. 2408, 2417 (1992).

Thus, even if Lopez is correct that section 922(q) intrudes upon a domain traditionally left to the states, it is constitutional as long as it falls within the commerce power. See Gregory v. Ashcroft, 111 S. Ct. at 2400 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States."). This is not to say, however, that the Tenth Amendment is irrelevant to a Commerce Clause analysis. Our understanding of the breadth of Congress' commerce power is related to the degree to which its enactments raise Tenth Amendment concerns, that is concerns for the meaningful jurisdiction reserved to the states. At a more textual level, the Tenth Amendment, though it does not purport to define the limits of the commerce power, obviously proceeds on the assumption that the reach of that power is not unlimited, else there would be nothing on which the Tenth Amendment could operate.

A good place to begin our analysis is the case of United States v. Bass, 404 U.S. 336, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971). At issue in Bass was the felon in possession provision of the Omnibus Crime Control Act of 1968, which made it unlawful for any felon to "receive[], possess[], or transport[] in commerce or affecting commerce" any firearm. 18 U.S.C. former § 1202(a)(1). Because the "in commerce or affecting commerce" language might be read to apply only to the crime of transporting a firearm, the question for the Court was whether, in pure possession cases, the government had to prove a connection to commerce or whether section 1202 reached the mere possession of firearms. The best evidence for the government's position that the statute reached mere possession without any commerce nexus was the floor statements of Senator Long, who introduced section 1202, and the formal findings contained in Title VII of this 1968 act.[7] While conceding that this legislative history lent "some significant support" for the government's view, id. at 521, the Court was not convinced. Were section 1202 read to punish mere possession without a commerce nexus, the Court argued, it would intrude upon an area of traditional state authority and would push Congress' commerce power to its limit, if not beyond. Because Congress had not clearly expressed its intent to do so, the Court therefore adopted the narrower construction of the statute:

> "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by

> the States. . . . [Thus] we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." Id. at 523 (footnotes omitted).

Significantly, the Bass Court noted that "in light of our disposition of the case, we do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms." Id. at 518 n.4. In a subsequent case, the Court held that to satisfy former section 1202's commerce nexus, it need only be shown that the possessed firearm had traveled at some time in interstate commerce. See Scarborough v. United States, 431 U.S. 563, 97 S. Ct. 1963, 1965, 52 L. Ed. 2d 582 (1977).[8] However, Scarborough did not purport to answer the question left open in Bass' footnote 4.

The government argues that section 922(q) is no different from a number of other federal firearms crimes. We are not persuaded. With the exception of a few relatively recent, special case provisions, federal laws proscribing firearm possession require the government to prove a connection to commerce, or other federalizing feature, in individual cases. For example, 18 U.S.C. § 922(g), the successor to former section 1202, makes it unlawful for felons and some other classes of persons to "possess [a firearm] in or affecting commerce." Because a commerce nexus is an element of the crime defined by section 922(g), each application of that statute is within the commerce power. See United States v. Wallace, 889 F.2d 580, 583 (5th Cir. 1989), cert. denied, 497 U.S. 1006, 110 S. Ct. 3243, 111 L. Ed. 2d 753 (1990) (holding that section 922(g) "reaches only those firearms that [have] traveled in interstate or foreign commerce and is thus constitutional"). Section 922(q), lacking such a nexus requirement, is not on an equal footing with statutes like section 922(g). The government points to several firearm proscriptions not requiring the specific firearm to have traveled in commerce, such as: 18 U.S.C. § 922(a)(6) (false statement in acquisition of firearm from licensed dealer, manufacturer, or importer); id. § 922(b)(1) & (2) (sale or delivery by licensed dealer, manufacturer, or importer to a minor or in violation of state law); id. § 922(b)(4) (sale or delivery by licensed dealer, manufacturer, or importer of certain specified weapons, such as machine guns or short-barrelled rifles); id. § 922(m) (recordkeeping violations by licensed dealer, manufacturer, or importer). However, not only do all these proscriptions pertain to essentially commercial actions involving the firearms business, as opposed to mere simple possession by any individual, cf. United States v. Nelson, 458 F.2d 556, 559 (5th Cir. 1972) ("acquisition of firearms is more closely related to interstate commerce than mere possession"), but each is also expressly tied to the dealer, manufacturer, or importer in question being federally licensed. 18 U.S.C. § 921(a)(9), (10), & (11).[9]

Historical Outline, Federal Firearms Legislation

We now digress to outline at some length the major developments in the history of presently relevant federal firearms control legislation.

General federal domestic legislation in this area may be traced to two enactments, first, the National Firearms Act of 1934, 48 Stat. 1236-1240, originally codified as 26 U.S.C. § 1132, now codified, as amended, as chapter 53 of the Internal Revenue Code of 1986, 26 U.S.C. §§ 5801-5872, and, second, the Federal Firearms Act of 1938, 52 Stat. 1250, originally codified as former 15 U.S.C. § 901-910, now repealed, the provisions of which, as amended and supplemented, have been carried forward to chapter 44 of Title 18, 18 U.S.C. §§ 921 et seq.[10]

The National Firearms Act of 1934

The National Firearms Act, applicable only to a narrow class of firearms such as machine guns, "sawed-off" shotguns and rifles, silencers, and the like, 26 U.S.C. § 5845(a),[11] is grounded on Congress' taxing power under Article I, Section 8, Clause 1. Sonzinsky v. United States, 300 U.S. 506, 57 S. Ct. 554, 81 L. Ed. 772 (1937); United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939). Its prohibitions are keyed to the imposition of an excise tax on the business of dealing in such weapons and on transfers of them, together with related requirements for registration of the dealer, the transfers, and the weapons. See Sonzinsky; Miller; Haynes v. United States, 88 S. Ct. 772 (1968); United States v. Freed, 401 U.S. 601, 91 S. Ct. 1112, 1115-1117, 28 L. Ed. 2d 356 (1971). However, section 922(q), which concerns us here, has no roots or antecedent in the National Firearms Act, is in no way related or tied to taxation or any character of registration or reporting, and is applicable to all firearms. Accordingly, the National Firearms Act, and its history and development, are essentially irrelevant to our present inquiry, and we turn our attention to the Federal Firearms Act and its successors.[12]

The Federal Firearms Act of 1938

The Federal Firearms Act of 1938 applied to all firearms, former 15 U.S.C. § 901(3), and prohibited "any manufacturer or dealer" not licensed thereunder from transporting, shipping, or receiving

any firearm or ammunition "in interstate or foreign commerce," id. § 902(a), and also prohibited "any person" from receiving any firearm or ammunition "transported or shipped in interstate or foreign commerce in violation of" section 902(a). Id. § 902(b). Licensed dealers and manufacturers could ship firearms interstate only to other licensed dealers and manufacturers and to those who had or were not required to have a license under state law to purchase the firearm, id. § 902(c). Licensed dealers and manufacturers were required to keep records of firearms transactions. Id. § 903(d). It was made an offense for "any person" to ship or transport "in interstate or foreign commerce" any stolen firearm or ammunition, id. § 902(g), and for "any person to transport, ship, or knowingly receive in interstate or foreign commerce" any firearm with an altered or removed serial number. Id. § 902(i). It was also made unlawful for "any person" to ship or transport "in interstate or foreign commerce" any firearm or ammunition to any felon, person under felony indictment, or fugitive from justice,[13] id. § 902(d); and, felons, those under felony indictment, and fugitives, could not "ship" or "transport" any firearm or ammunition "in interstate or foreign commerce." Id. § 902(e). Further, felons and fugitives could not "receive any firearm or ammunition that had been shipped or transported in interstate or foreign commerce." Id. § 902(f). The latter section included a provision that "possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter." Id.[14] In Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), this presumption was held invalid on due process grounds as applied to whether the weapon "was received by" the defendant "in interstate or foreign commerce" or after the effective date of the act. Id. at 1244, 1245.

Omnibus Crime Control and Safe Streets Act of 1968

The Federal Firearms Act remained otherwise in force without significant change until the enactment in June 1968 of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 90th Cong. 2d Sess. (1968) 82 Stat. 197. Title IV (§§ 901-907) of P.L. 90-351 repealed the Federal Firearms Act (id. § 907) and enacted a new chapter 44 ("Firearms") of Title 18 (18 U.S.C. § 921-928), which incorporated, with some amendments, almost all the provisions of the Federal Firearms Act,[15] and added further firearms offenses.

Unlike the Federal Firearms Act, this legislation required a federal license "for any person . . . to engage in the business of importing, manufacturing, or dealing in firearms, or ammunition" even though the business did not operate in interstate commerce. P.L. 90-351, § 902; 18 U.S.C. § 922(a)(1). See also id. § 923(a). The relevant committee report states that new section 922(a)(1) "makes it clear that a license is required for an intrastate business as well as an interstate business. The present Federal Firearms Act (15 U.S.C. § 902(a)) merely prohibits the interstate or foreign shipment or receipt of firearms by a manufacturer or dealer unless he has a license." Sen. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 2112 at 2202.[16]

Public Law 90-351 § 901(a) contains, among others, the following express Congressional findings, viz:

> "(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power; . . .
>
> (3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible; . . . ." (emphasis added).[17]

These Congressional findings may properly be understood as saying that federal regulation of all firearms dealers and manufacturers, not just those conducting an interstate business, was necessary in order to control firearms traffic "moving in or otherwise affecting interstate or foreign commerce." In Nelson, 458 F.2d at 559, we quoted the above set-out section 901(a)(3), and observed that "if Congress is to effectively prevent the interstate use of guns for illegal purposes it must control their sources: manufacturers, dealers, and importers."[18] This reasoning from the quoted Congressional findings in support of the requirement that all firearms manufacturers and dealers be federally licensed is analogous to the reasoning we employed in United States v. Lopez, 459 F.2d 949 (5th Cir.), cert. denied sub nom. Llerena v. United States, 409 U.S. 878, 93 S. Ct. 130, 34 L. Ed. 2d 131 (1972), in sustaining federal regulation of intrastate as well as interstate narcotics traffic. See id. at 951-53 (relying on express Congressional findings "that intrastate incidents of the traffic in controlled substances . . . had a substantial and direct effect on interstate commerce" and "swelled the interstate

traffic in such substances," that "it was impossible to distinguish between substances manufactured and distributed intrastate from those manufactured and distributed interstate," and thus "that control of the intrastate incidents of traffic in controlled substances was essential to control of interstate incidents of that traffic").

However, it is significant that, apart from the license requirement for all firearms dealers and manufacturers, all the numerous proscriptions of chapter 44 of Title 18, as thus enacted, were expressly tied either to interstate commerce or to the regulation of the conduct of, or dealings with, federally licensed dealers, manufacturers, or importers, or to both. This was true not only for the proscriptions that were carried over from the Federal Firearms Act,[19] but also for the added proscriptions.[20]

In Title VII of P.L. 90-351 Congress also enacted what came to be codified as 18 U.S.C. App. §§ 1201 through 1203 (now repealed). Title VII was added on the Senate floor, "hastily passed, with little discussion, no hearings, and no report," and "never received committee consideration in" either chamber. Bass, 92 S. Ct. at 520 & n.11. Section 1202(a) criminalized any felon (or person discharged other than honorably from the Armed Forces, or adjudged a mental incompetent, or who had renounced United States citizenship, or was an alien unlawfully in the country) "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm." Section 1201 contained Congressional findings "that the receipt, possession, or transportation of a firearm by felons" (and by the other categories of persons covered by section 1202(a)) "constitutes (1) a burden on commerce or threat affecting the free flow of commerce," and "a threat to the safety of the President . . . and Vice-President" and to the continued effective operation of the federal and all state governments, and "an impediment or a threat" to the exercise of First Amendment rights. In the Firearms Owners' Protection Act of 1986, P.L. 99-308, 99th Cong., 2d Sess., 104 Stat. 449, other aspects of which we consider in more detail below, all of Title VII (including section 1201 and all its findings) was repealed, P.L. 99-308, § 104(b), and most of the substantive provisions of Title VII (e.g., §§ 1202 & 1203) were essentially incorporated into section 922. P.L. 99-308, § 102.

Gun Control Act of 1968

In October 1968, Congress enacted the Gun Control Act of 1968, P.L. 90-618, 90th Cong. 2d Sess., 82 Stat. 1213. Title I of this legislation reenacted all of chapter 44 of Title 18 (§§ 921-928), but with what are for present purposes essentially only minor changes from the version thereof enacted earlier that year by Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.[21] Among these changes were, for example, removal or narrowing of most of the exemptions that Title IV had made for rifles and shotguns (see note 20, supra, and note 23, infra), additional coverage of transactions in ammunition in certain instances where Title IV dealt only in firearms, and adding unlawful users of federally regulated narcotics and adjudicated mental defectives to felons, fugitives, and indictees as persons concerning whom certain firearm transactions were prohibited.[22] Title I also added certain new prohibitions on licensees, including a new section 922(c) prohibiting licensees from selling firearms to those who are not licensees unless the purchaser either appeared in person on the licensee's premises or furnished a sworn statement as to his eligibility and seven days' notice was given the chief law enforcement officer of the transferee's residence prior to delivery or shipment. Other provisions relaxed some of the restrictions of section 922(a)(3) & (5) as enacted by Title IV of P.L. 90-351.[23] In sum, the Gun Control Act of 1968 maintained the same essential jurisdictional bases of the earlier 1968 legislation, namely -- apart from the license requirement for all dealers and manufacturers -- an express nexus either to interstate commerce or to the conduct of, or dealings with, federally licensed dealers or manufacturers, or to both. The legislative history is consistent with this approach.[24] The House committee report explains the purpose of the Gun Control Act of 1968 (which originated as H.R. 17735) in relevant part as follows:

> "PURPOSE
>
> The principal purpose of H.R. 17735, as amended, is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders.
>
> . . .
>
> GENERAL STATEMENT
>
> The increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic.
>
> The subject legislation responds to widespread national concern that existing Federal control over the sale and shipment of firearms [across] State lines is grossly inadequate.

> Handguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today.
>
> . . .
>
> The committee is persuaded that the proposed legislation imposes much needed restrictions on interstate firearms traffic and, at the same time, does not interfere with legitimate recreational and self-protection uses of firearms by law-abiding citizens. The committee urges its enactment."

H.R. Rep. No. 1577, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 4410 at 4411-13, 4415 (emphasis added).

Firearms Owners' Protection Act of 1986

This basic jurisdictional structure -- the licensing of all firearms dealers and manufacturers, based on Congress' express finding (in the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, § 902(a)(3)) to the effect that such was necessary to adequate federal control of interstate and foreign commerce in firearms, and in all other instances an express nexus either to interstate commerce or to the activity of, or dealings with, federally licensed dealers or manufacturers, or to both[25] -- has continued to the present, with only a few, discrete exceptions, the first of which arose in 1986, in the Firearms Owners' Protection Act, P.L. 99-308, 99 Cong., 2d Sess., 100 Stat. 449-461.

Section 102(5)(A) of the Firearms Owners' Protection Act, 100 Stat. 451-52, amended section 922(d), as explained in the relevant committee report, "by extending the prohibition on transferring firearms to disqualified persons [e.g., felons, fugitives, etc.] from only licensees to private individuals as well." H.R. Rep. No. 99-495, 99 Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 1327 at 1341. The explanation for this particular amendment appears in an "assessment" of the bill by the Bureau of Alcohol, Tobacco and Firearms (BATF) that appears in full as a part of this committee report, and states "This proposal would close an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons." Id. 1986 U.S.C.C.A.N. at 1343.[26] This amendment to section 922(d) does not render it analogous to section 992(q), which is presently before us. To begin with, section 922(d) deals with transfers, not mere possession, and, as we said in Nelson, "acquisition of firearms is more closely related to interstate commerce than mere possession." Id. 458 F.2d at 559. Moreover, the above quoted legislative history indicates that Congress determined that relegation of all transferors to disqualified persons, not just federal licensee transferors, was necessary to prevent evasion of the regulation of federal licensees (a regulation with independent legitimacy, see note 9, supra). This is consistent with the approach we took in Lopez in sustaining federal regulation of intrastate, as well as interstate, narcotics trafficking. Id. 459 F.2d at 951-53. See also Nelson, 458 F.2d at 559 (relying on Congressional finding in P.L. 90-351, § 901(a)(3), and observing that "if Congress is to effectively prevent the interstate use of guns for illegal purposes it must control their sources: manufacturers, dealers and importers"). Finally, the overall structure and history, as well as the title, of the Firearms Owners' Protection Act suggest no Congressional determination that mere possession of ordinary firearms implicates interstate commerce or other federal concerns. Indeed, Congress in that legislation expressly found, inter alia, "that (1) the rights of citizens -- (A) to keep and bear arms under the second amendment to the United States Constitution; . . .; and (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies." P.L. 99-308 § 1(b).[27]

Further, this legislation amended several provisions of section 922 and section 924 that contained express interstate commerce nexus requirements without diluting those requirements. This was true, for example, with respect to the amendments to section 922(g), prohibiting felons (and other disqualified persons) from shipping or transporting any firearms "in interstate or foreign commerce," from receiving any firearm "which has been shipped or transported in interstate or foreign commerce" and, as added by the amendment, from possessing any firearm "in or affecting commerce." P.L. 99-308 § 102(6). As we explained in Wallace, 889 F.2d at 583, the legislative history of this amendment clearly showed that the phrase "in or affecting commerce" meant "interstate" commerce, and that accordingly the possession offense of thus amended section 922(g) "reaches only those firearms that traveled in interstate or foreign commerce and is thus constitutional." (Emphasis added). Similarly, the legislation enacted a new section 922(n), P.L. 99-308 § 102(8), which proscribed those under felony indictment -- whom the same legislation removed from sections 922(g) and (h) -- from shipping or transporting any firearm "in interstate or foreign commerce" and from receiving any firearm "which has been shipped or transported in interstate or foreign commerce."[28] Also, the express federal nexus was retained where the Firearms Owners'

Protection Act amended sections 924(c) and 929(a) to add "drug trafficking crime" to the offenses concerning which firearm (or certain ammunition) use was proscribed, while retaining the requirement that the offense in any event be one that could "be prosecuted in a court of the United States." See note 25, supra. Similarly, the amendment made to section 922(a)(3), concerning a non-licensee's transportation into or receipt within his state of residence of a firearm "obtained by such person outside that state" broadened to all types of firearms an exception previously limited to shotguns and rifles, but retained the "obtained by such person outside that state" language. P.L. 99-308 § 102(3). Likewise, the restriction on licensed dealer sales to non-residents of the state of the licensee's business location was amended but without altering the interstate character of the subject matter. Id. § 102(4). And, the legislation left unchanged other provisions of section 922 expressly requiring an interstate commerce nexus, such as, for example, section 922(a)(5), generally prohibiting non-licensee transfers of firearms to other non-licensees residing in a state other than that of the transferor's residence.

The other Firearms Owners' Protection Act change relevant in this connection is its section 102(9), 100 Stat. 452-53, adding a new section 922(o) making it unlawful for "any person to transfer or possess a machine gun" except for any "lawfully possessed before the date this subsection takes effect." There is no committee report, and sparse legislative history, concerning this provision, as it was added on the House floor. The only apparent explanation for it is the statement of its sponsor, Representative Hughes, that "I do not know why anyone would object to the banning of machine guns." See Farmer v. Higgins, 907 F.2d 1041, 1044-45 (11th Cir. 1990). While section 922(o) is a closer parallel than others to section 922(q) presently before us, as both sections denounce mere possession with no express tie either to interstate commerce or other federalizing element, we decline to read into section 922(o) any implied Congressional determination that possession of firearms generally, or within one thousand feet of any school grounds, affects interstate commerce. Section 922(o) is restricted to a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported after enactment of the Firearms Owners' Protection Act,[29] which is more suggestive of a nexus to or affect on interstate or foreign commerce than possession of any firearms whatever, no matter when or where originated, within one thousand feet of the grounds of any school.

The only two circuit courts that have addressed a constitutional challenge to section 922(o), United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992), cert. denied, 123 L. Ed. 2d 174, 113 S. Ct. 1614 (1993); United States v. Evans, 928 F.2d 858 (9th Cir. 1991), have sustained it in reliance on Congressional findings that appear to us to be inapplicable in the present context, whatever relevance they might have to section 922(o).[30] Hale states that, "The legislative history of section 922(o) indicates that Congress considered the relationship between the availability of machine guns, violent crime, and narcotics trafficking. See H.R. Rep. No. 495, 99th Cong., 2d Sess., at 1-5, reprinted in 1986 U.S.C.C.A.N. 1327, 1327-31." Id. at 1018. The only portion of the cited passage of the H.R. Rep. No. 495 that relates to machine guns -- and it will be recalled that neither section 922(o) nor anything comparable to it was included in the bill (H.R. 4332) there being considered -- is a discussion of the history of the legislation, including various earlier bills that did not become law. One of the earlier bills discussed was H.R. 3135, introduced August 1, 1985, and H.R. Rep. No. 495 observes that H.R. 3135 "prohibited the transfer and possession of machine guns, used by racketeers and drug traffickers for intimidation, murder and protection of drugs and the proceeds of crime. The bill allowed possessors of lawfully registered machine guns to continue their lawful possession." 1986 U.S.C.C.A.N. at 1330. Whatever this may say about machine guns, it says nothing about the mere possession of ordinary firearms. Given the formal Congressional findings contained in the Firearms Owners' Protection Act (see note 27, supra), which avow a purpose to enhance Second and Tenth Amendment rights and express solicitude for the freedom of citizens to possess ordinary firearms, it would be entirely inappropriate to consider the above-quoted portions of the committee report as having any relevance beyond machine guns and similar destructive weapons.[31]

Section 922(o) is not before us, and we intimate no views as to it. However, we do not regard Hale and Evans as persuasive respecting either the validity of section 922(q) or the existence of express or implied Congressional findings supportive thereof.

The Undetectable Firearms Act of 1988

We note two firearms provisions enacted in 1988. The Undetectable Firearms Act of 1988, P.L. 100-649, 100th Cong., 2d Sess., 102 Stat. 3816, added to Title 18 § 922(p) making it unlawful for any person to "manufacture, import, ship, deliver, possess, transfer, or receive" any firearms either not as detectable "by walk-through metal detectors" as an exemplar to be developed by the Secretary of the Treasury or which "when subjected to inspection by

the type of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of" any major component thereof. Section 922(p)(1). Exempted were "any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment" of the act. Section 922(p)(6). Although there is no express requirement of an interstate nexus for the section 922(p) possession offense, we reject the government's argument that this legislation is analogous to section 922(q). Section 922(p)'s employment of the standard of "x-ray machines commonly used at airports" plainly reflects the act's interstate commerce related purpose and nexus. This is confirmed by the legislative history, as the relevant committee report notes "the threat posed by firearms which could avoid detection at security checkpoints: airports, government buildings, prisons, courthouses, the White House." H.R. Rep. No. 100-612, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 5359.[32]

Anti-Drug Abuse Amendments Act of 1988

The other 1988 firearms legislation is subtitle G (§§ 6211-6215) of Title VI ("Anti-Drug Abuse Amendments Act of 1988") of the Anti-Drug Abuse Act of 1988, P.L. 100-690, 100th Cong., 2d Sess., 102 Stat. 4181, 4359-62. Subtitle G added to Title 18 sections 924(f) and (g) and 930. P.L. 100-960, §§ 6211, 6215. Section 924(g) denounces "whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2))." There is no requirement that the transfers have an interstate character or that the firearms have been in interstate commerce. While "drug trafficking crime" is limited to federal offenses -- and this limitation was maintained even though the same legislation slightly amended the definition thereof in section 924(c)92) and section 929(a)(2)[33] -- "crime of violence" is not so limited. Section 924(c)(3). Our attention has not been called to legislative history suggesting an explanation for this seeming anomaly.[34] It seems anomalous in several respects.

There is no apparent reason why the drug trafficking crime must be federal, but not the crime of violence. Further, no amendment was made to section 924(b), denouncing the shipment, transport, or receipt of a firearm "in interstate or foreign commerce" with "knowledge or reasonable cause to believe that" a felony "is to be committed therewith"; nor to section 924(c)(1) denouncing use or carrying of a firearm during or in relation to "any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States."[35] The seemingly unusual result is that anyone who transfers intrastate a firearm (which has not been in interstate commerce) knowing it will be used in a crime of violence in that state commits a federal crime even though the crime of violence is not a federal offense, but the party perpetrating the crime of violence with the firearm in that same state violates federal law only if the crime of violence is one "for which he may be prosecuted in a court of the United States." A possible inference from this is that transfer is deemed more related to the regulation of interstate commerce than mere use or possession. Cf. Nelson, 458 F.2d at 559 ("acquisition of firearms is more closely related to interstate commerce than mere possession").[36]

The 1988 legislation, like that before it, demonstrates neither a pattern of regulation that abjures any express nexus to interstate commerce or other federal element nor any express or implied Congressional finding about mere possession of ordinary firearms absent such a nexus.

Crime Control Act of 1990

At long last, we turn to the Crime Control Act of 1990, P.L. 101-647, 101st Cong., 2d Sess., 104 Stat. 4789-4968, which included, as part of its XVII ("General Provisions"), section 1702, 104 Stat. 9844-45, the Gun-Free School Zone Act of 1990, that enacted the new section 922(q).[37] Preliminarily, we note that the Crime Control Act of 1990 also contained a Title XXII ("Firearms Provisions"), P.L. 101-647, § 2201-2205, 104 Stat. 4856-58, which revised other portions of chapter 44 of Title 18. These other revisions all retained or provided for an express interstate commerce (or other federal jurisdiction) nexus for the various Title 18, chapter 44, offenses the provisions of which were being amended.[38]

Gun-Free School Zones Act of 1990

The Gun-Free School Zones Act of 1990, now section 922(q), was introduced in the Senate by Senator Herbert Kohl as S. 2070 and a virtually identical bill with the same title was introduced in House by Representative Edward Feighan as H.R. 3757. The Senate version was eventually enacted as part of Title XVII of the Crime Control Act of 1990, P.L. 101-647 § 1702, 104 Stat. 4844-45. The House Report accompanying the Crime Control Act broadly declares that the intent of the Crime Control Act was "to provide a legislative response to various aspects of the problem of crime in the United States." H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. 69 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6473. However, this report makes no mention whatsoever of the impact upon commerce of firearms in schools. Nor does the report even mention the

Gun-Free School Zones Act. Although S. 2070 has no formal legislative history that we know of, a House subcommittee hearing was held on H.R. 3757. Witnesses told this subcommittee of tragic instances of gun violence in our schools, but there was no testimony concerning the effect of such violence upon interstate commerce. Indeed, the noticeable absence of any attempt by Congress to link the Gun-Free School Zones Act to commerce prompted the Chief of the Firearms Division of the BATF and the BATF's Deputy Chief Counsel, to testify as follows:

> "Finally, we would note that the source of constitutional authority to enact the legislation is not manifest on the face of the bill. By contrast, when Congress first enacted the prohibitions against possession of firearms by felons, mental incompetents and others, the legislation contained specific findings relating to the Commerce Clause and other constitutional bases, and the unlawful acts specifically included a commerce element." Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 101st Cong., 2d Sess., at 10 (1990) (statement of Richard Cook and Bradley Buckles) (hereinafter, House Hearings).

Although both the House and Senate sponsors of the Gun-Free School Zones Act made fairly lengthy floor statements about it, neither congressman had anything to say about commerce in their remarks. See 136 Cong. Rec. S17595 (1990) (statement of Sen. Kohl); 136 Cong. Rec. S766 (1990) (same); 135 Cong. Rec. E3988 (1989) (inserted statement of Rep. Feighan).

The failure of section 922(q) to honor the traditional division of functions between the Federal Government and the States was commented upon by President Bush when he signed the Crime Control Act of 1990:

> "I am also disturbed by provisions in S. 3266 that unnecessarily constrain the discretion of State and local governments. Examples are found in Title VIII's 'rural drug enforcement' program; in Title XV's 'drug-free school zones' program; and in Title XVIII's program for 'correctional options incentives.' Most egregiously, section 1702 inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress." Statement by President George Bush upon Signing S. 3266, 26 Weekly Comp. Pres. Doc. 1944 (Dec. 3, 1990), reprinted in 1990 U.S.C.C.A.N. 6696-1 (emphasis added).[39]

Commerce Power

We are, of course, fully cognizant and respectful of the great scope of the commerce power. It is generally agreed that in a series of decisions culminating in Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), the Supreme Court fixed the modern definition of the commerce power, returning it to the breadth of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). As stated in one treatise:

> "After Wickard, the tests for proper exercise of the commerce power were settled. First, Congress could set the terms for the interstate transportation of persons, products, or services, even if this constituted prohibition or indirect regulation of single state activities. Second, Congress could regulate intrastate activities that had a close and substantial relationship to interstate commerce; this relationship could be established by congressional views of the economic effect of this type of activity. Third, Congress could regulate -- under a combined commerce clause-necessary and proper clause analysis -- intrastate activities in order to effectuate its regulation of interstate commerce."

Rotunda & Nowack, Treatise on Constitutional Law; Substance and Procedure 2nd, § 4.9 at 404-5.

Board as the commerce power is, its scope is not unlimited, particularly where intrastate activities are concerned. As the Court said in Maryland v. Wirtz, 392 U.S. 183, 88 S. Ct. 2017, 2024, 20 L. Ed. 2d 1020 (1968):

> "This Court has always recognized that the power to regulate commerce, though broad indeed, has limits. Mr. Chief Justice Marshall paused to recognize those limits in the course of the opinion that first staked out the vast expanse of federal authority over the economic life of the new Nation. Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 194-195, 6 L. Ed. 23.

Chief Justice Marshall explained in Gibbons v. Ogden:

> "The subject to which power is next applied, is to commerce 'among the several states.'. . . Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. . . . The enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." Id., 9 Wheat. at 194-95, 6 L. Ed. at 69-70.

Similarly, in Wickard v. Filburn, the Court stated:

> "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Id., 63 S. Ct. at 89 (emphasis added).

This passage has been quoted with approval many times. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 383, 13 L. Ed. 2d 290 (1964); Perez v. United States, 402 U.S. 146, 91 S. Ct. 1357, 1360, 28 L. Ed. 2d 686 (1971). In United States v. American Building Maintenance Industries, 422 U.S. 271, 95 S. Ct. 2150, 2156, 45 L. Ed. 2d 177 (1975), the Court speaks of the "full Commerce Clause power" as extending to "all activity substantially affecting interstate commerce" (emphasis added). Analogously, in United States v. Wrightwood Dairy Co., 315 U.S. 110, 62 S. Ct. 523, 526, 86 L. Ed. 726 (1942), Chief Justice Stone's opinion for a unanimous Court states that the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power" (emphasis added).[40] Justice Harlan, writing for the Court in Maryland v. Wirtz, made the message explicit: "Neither here nor in Wickard [v. Filburn] has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." Id., 88 S. Ct. at 2024 n.27. Indeed, it could not be otherwise as the chain of causation is virtually infinite, and hence there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place. Hence, if the reach of the commerce power to local activity that merely affects interstate commerce or its regulation is not understood as being limited by some concept such as "substantially" affects, then, contrary to Gibbons v. Ogden, the scope of the Commerce Clause would be unlimited, it would extend "to every description" of commerce and there would be no "exclusively internal commerce of a state" the existence of which the Commerce Clause itself "presupposes" and the regulation of which it "reserved for the state itself."

We recognize, of course, that the imprecise and matter of degree nature of concepts such as "substantially," especially as applied to effect on interstate commerce, generally renders decision making in this area peculiarly within the province of Congress, rather than the Courts. And, the Supreme Court has consistently deferred to Congressional findings in this respect, both formal findings in the legislation itself and findings that can be inferred from committee reports, testimony before Congress, or statutory terms expressly providing for some nexus to interstate commerce. Relatively recent examples of statutes upheld against Commerce Clause attacks on the basis of formal Congressional findings include EEOC v. Wyoming, 460 U.S. 226, 103 S. Ct. 1054, 1058, 75 L. Ed. 2d 18 & n.3 (1983) (Age Discrimination in Employment Act); FERC v. Mississippi, 456 U.S. 742, 102 S. Ct. 2126, 2135, 72 L. Ed. 2d 532 (1982) (Public Utility Regulatory Policies Act); Hodel v. Virginia Surface Mining, 452 U.S. 264, 101 S. Ct. 2352, 2361, 69 L. Ed. 2d 1 (1981) (Surface Mining Control and Reclamation Act); Perez, 91 S. Ct. at 1358 n.1, 1362 (Consumer Credit Protection Act).[41] In other cases, the Court has looked to the legislative history and the terms of the challenged statute itself to identify and sustain findings of a sufficient effect on interstate commerce. For example, in McClung the Court upheld section 201(b)(2) and (c) of Title II of the Civil Rights Act of 1964, the terms of which covered any restaurants "if their operations affect commerce" and presumed that any did "'if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . .

has moved in commerce.'" Id. at 381. In so ruling, despite the absence of "formal findings," the Court relied on the wording of the statute itself, which amounted to an express finding of the requisite effect on commerce under certain facts, and on the legislative history showing the extensive evidence before Congress implicating interstate commerce. Thus the Court noted that

> "The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants. . . . Moreover, there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes." Id. at 381.
>
> "We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it." Id. at 382.
>
> ". . . Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally." Id. at 383.

In sustaining the statute the Court concluded by stating:

> "The appellees urge that Congress, in passing the Fair Labor Standards Act and the National Labor Relations Act, made specific findings which were embodied in those statutes. Here, of course, Congress has included no formal findings. But their absence is not fatal to the validity of the statute, [citation omitted] for the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate.
>
> "Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. Insofar as the sections of the Act here relevant are concerned, §§ 201(b)(2) and (c), Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, i.e., those, like the McClungs', serving food that has come from out of the State. We think in so doing that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce." Id. at 384 (footnote omitted).[42]

Where Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer "if there is any rational basis for" the finding. Preseault v. I.C.C., 494 U.S. 1, 110 S. Ct. 914, 924, 108 L. Ed. 2d 1 (1990); Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 101 S. Ct. 2352, 2360, 69 L. Ed. 2d 1 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 358, 13 L. Ed. 2d 258 (1964); McClung, 85 S. Ct. at 383. Practically speaking, such findings almost always end the matter.[43] This means that the states, and the people, must largely look to their representatives in Congress to fairly and consciously fix, rather than to simply disregard, the Constitution's boundary line between "the completely internal commerce of a state . . . reserved for the state itself" and the power to regulate "Commerce with foreign Nations, and among the several States." Courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding.[44] And, in such a situation there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states. Indeed, as in this case, there is no substantial indication that the commerce power was even invoked.[45]

Congressional enactments are, of course, presumed constitutional. But in certain areas the presumption has less force. Cf. United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 783, 82 L. Ed. 1234 n.4 (1938) ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . . ."). Here the question is essentially a jurisdictional one, and any expansion of federal power is at the expense of the powers reserved to the states by the Tenth Amendment, which is, after all, as much a part of the Bill of Rights as the First.[46] Both the management of

education, and the general control of simple firearms possession by ordinary citizens, have traditionally been a state responsibility, and section 922(q) indisputably represents a singular incursion by the Federal Government into territory long occupied by the States. In such a situation where we are faced with competing constitutional concerns, the importance of Congressional findings is surely enhanced.[47]

We draw support for our conclusion concerning the importance ofCongressional findings from recent holdings that when Congress wishes to stretch its commerce power so far as to intrude upon state prerogatives, it must express its intent to do so in a perfectly clear fashion. In Pennsylvania v. Union Gas, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989) (plurality opinion), the Court held that Congress could use its commerce power to abrogate the sovereign immunity guaranteed to the States by the Eleventh Amendment only if its intent to do so is "unmistakably clear." Id. at 2277 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985)). In another case decided the same day, the Court explained that this rule exists because "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine." Dellmuth v. Muth, 491 U.S. 223, 109 S. Ct. 2397, 2400, 105 L. Ed. 2d 181 (1989) (citations and internal quotation marks omitted). Two years later, in Gregory v. Ashcroft, the Court held that the Age Discrimination inEmployment Act (ADEA) did not sweep away the Missouri Constitution's provision for the mandatory retirement of state judges at age seventy. Arguing that a State's power to set the qualifications for its judiciary "is a decision of the most fundamental sort for a sovereign entity," 111 S. Ct. at 2400, the Court held that the ADEA did not bespeak a sufficiently clear intent to annul this state prerogative:

> "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." Id. at 2401 (quoting Atascadero, 105 S. Ct. at 3147).[48]

We recognize that the rule being applied in those cases is one of statutory construction. Nevertheless, Gregory, Union Gas, and Bass establish that Congress' power to use the Commerce Clause in such a way as to impair a State's sovereign status, and its intent to do so, are related inquiries. Thus, in Gregory, Congress' power to trump the Missouri Constitution was unquestioned but its intent to do so was unclear; hence the Court held that the State's Tenth Amendment interests would prevail. Here, Congress surely intended to make the possession of a firearm near a school a federal crime, but it has not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause.

In 1985, the Supreme Court held that the Tenth Amendment imposes no internal limitation upon the Commerce Clause; as long as Congress acts within the commerce power it cannot violate the Tenth Amendment. See Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976)). The Garcia Court sought to assuage the fears of four dissenting Justices by arguing that, as a body of state representatives, Congress would respect the sovereignty of the several States and could be trusted to police the constitutional boundary between the Tenth Amendment and the Commerce Clause. See Garcia, 105 S. Ct. at 1017-19. By expecting Congress to build a more sturdy foundation for the exercise of its commerce power than it has done in this case, we hope to "further[] the spirit of Garcia by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests." L. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988) (footnote omitted).

The Gun Free School Zones Act extends to criminalize any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session. Neither the act itself nor its legislative history reflect any Congressional determination that the possession denounced by section 922(q) is in any way related to interstate commerce or its regulation, or, indeed, that Congress was exercising its powers under the Commerce Clause. Nor do any prior federal enactments or Congressional findings speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows

thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation.[49]

The district court sustained section 922(q) on the basis that the "'business' of elementary, middle and high schools . . . affects interstate commerce." However, as noted, there is no finding, legislative history, or evidence to support section 922(q) on this basis. The management of education, of course, has traditionally been a state charge, as Congress has expressly recognized. See 20 U.S.C. § 3401(4) ("The Congress finds that . . . in our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States.").[50] We are unwilling to ourselves simply assume that the concededly intrastate conduct of mere possession by any person of any firearm substantially affects interstate commerce, or the regulation thereof, whenever it occurs, or even most of the time that it occurs, within 1000 feet of the grounds of any school, whether or not then in session. If Congress can thus bar firearms possession because of such a nexus to the grounds of any public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, "sneakers," Game Boys, or slide rules.

The government seeks to rely on the rule that "where the class of activities is regulated and that class is within the reach of the federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." Perez, 91 S. Ct. at 1361 (quoting Maryland v. Wirtz, 392 U.S. 183, 88 S. Ct. 2017, 2022, 20 L. Ed. 2d 1020 (1968)). This theory has generally been applied to the regulation of a class of activities the individual instances of which have an interactive effect, usually because of market or competitive forces, on each other and on interstate commerce. A given local transaction in credit, or use of wheat, because of national market forces, has an effect on the cost of credit or price of wheat nationwide. Some such limiting principle must apply to the "class of activities" rule, else the reach of the Commerce Clause would be unlimited, for virtually all legislation is "class based" in some sense of the term. We see no basis for assuming, particularly in the absence of supporting Congressional findings or legislative history, that, for example, ordinary citizen possession of a shotgun during July 900 feet from the grounds of an out-of-session private first grade in rural Llano County, Texas, has any effect on education even in relatively nearby Austin, much less in Houston or New Orleans. Nor can we assume that elementary education in Houston substantially affects elementary education in Atlanta. As noted, any such holding would open virtually all aspects of education, public and private, elementary and other, to the reach of the Commerce Clause.[51]

We hold that section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause.[52] Whether with adequate Congressional findings or legislative history, national legislation of similar scope could be sustained, we leave for another day. Here we merely hold that Congress has not done what is necessary to locate section 922(q) within the Commerce Clause. And, we expressly do not resolve the question whether section 922(q) can ever be constitutionally applied. Conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce.[53] Here, in fact, the parties stipulated that a BATF agent was prepared to testify that Lopez's gun had been manufactured outside of the State of Texas. Lopez's conviction must still be reversed, however, because his indictment did not allege any connection to interstate commerce. An indictment that fails to allege a commerce nexus, where such a nexus is a necessary element of the offense, is defective. See Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 273, 4 L. Ed. 2d 252 (1960) (Hobbs Act); United States v. Hooker, 841 F.2d 1225, 1227-32 (4th Cir. 1988) (en banc) (RICO); United States v. Moore, 185 F.2d 92, 94 (5th Cir. 1950) (FLSA). This is true even though the language of section 922(q) contains no such requirement. See Russell v. United States, 369 U.S. 749, 82 S. Ct. 1038, 1047-48, 8 L. Ed. 2d 240 (1962); 2 W. LaFave & J. Israel, Criminal Procedure § 19.2, at 452 (1984). Finally, because an indictment, unlike a bill of information, cannot be amended, the failure to allege each element is fatal. Cf. United States v. Garrett, 984 F.2d 1402, 1415 (5th Cir. 1993); United States v. Mize, 756 F.2d 353, 355-56 (5th Cir. 1985).

For the reasons stated, the judgment of conviction is reversed and the cause is remanded with directions to dismiss the indictment.[54]

REVERSED

ENDNOTES

1. Initially, state charges were filed against Lopez but those charges were dropped due to the federal prosecution. What Lopez did has been a felony under Texas law since at least 1974. See Tex. Penal Code § 46.04(a) (whoever "with a firearm . . . goes . . . on the premises of a school or an educational institution, whether public or private "); § 46.04(c) (third degree felony).

2. Section 922(q) became law November 29, 1990, as section 1702 of the Crime Control Act of 1990, P.L. 101-647, 101st

Cong. 2d Sess., 104 Stat. 4789, 4844-45. Its effective date was sixty days later. P.L. 101-647, § 1702(b)(4).

3. The Act defines a school zone as follows: "(A) in, or on the grounds of, a public, parochial or private school; or (B) within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25). "School" is defined as "a school which provides elementary or secondary education under State law." Section 921(a)(26). Lopez stipulated that Edison High School was and is a school zone.

4. Section 922(q)(1)(B) provides:

> "(B) Subparagraph (A) shall not apply to the possession of a firearm –
>
> (i) on private property not part of school grounds;
>
> (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtain such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;
>
> (iii) which is –
>
> (I) not loaded; and
>
> (II) in a locked container, or a locked firearms rack which is on a motor vehicle;
>
> (iv) by an individual for use in a program approved by a school in the school zone;
>
> (v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;
>
> (vi) by a law enforcement officer acting in his or her official capacity; or
>
> (vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities."

Thus, section 922(q)(1), together with section 922(a)(25) & (26) (note 3, supra), makes it a federal offense to carry an unloaded firearm in an unlocked suitcase on a public sidewalk in front of one's residence, so long as that part of the sidewalk is within one thousand feet -- two or three city blocks -- of the boundary of the grounds of any public or private school anywhere in the United States, regardless of whether it is during the school year or the school is in session. In Texas, at least, a tiny church kindergarten would be included. See United States v. Echevaria, 995 F.2d 562, 563 & n.5 (5th Cir. 1993); Tex. Ed. Code Ann. §21.797 (Vernon Supp. 1993).

5. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

6. "The Congress shall have Power . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

7. "Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons . . . constitutes -- -- (1) a burden on commerce or threat affecting the free flow of commerce." 18 U.S.C. § 1201. See Bass, 92 S. Ct. at 521 n.14.

8. See also Barrett v. United States, 423 U.S. 212, 96 S. Ct. 498, 46 L. Ed. 2d 450 (1976) (same under 18 U.S.C. § 922(h) as to felon's receipt of firearm previously transported in interstate commerce).

9. It does not seem surprising that those who choose to hold a federal license, or to deal with federal licensees, may be required in reference to the activities licensed to conform to federal requirements. See, e.g., Westfall v. United States, 274 U.S. 256, 47 S. Ct. 629, 71 L. Ed. 1036 (1957) (defrauding a state bank that is voluntarily a member of the Federal Reserve System may be made a federal offense because of that membership); United States v. Dunham, 995 F.2d 45 (5th Cir. 1993) (robbery of federally insured state bank); United States v. Hand, 497 F.2d 929, 934-5 (5th Cir. 1974), adhered to en banc, 516 F.2d 472, 477 (5th Cir. 1975), cert. denied, 424 U.S. 953, 47 L. Ed. 2d 359, 96 S. Ct. 1427 (1976) (status as federally chartered institution supports federal jurisdiction); United States v. Fitzpatrick, 581 F.2d 1221, 1223 (5th Cir. 1978) (federal chartering or federal insurance may each support federal jurisdiction). See also United States v. Mize, 756 F.2d 353 (5th Cir. 1985).

10. We lay to one side, as irrelevant to our inquiry, diverse federal legislation enhancing the penalty for use or possession of a firearm in the commission of some other federal offense. The jurisdictional basis of such legislation is obviously that applicable to the underlying federal offense, and the legislation is properly seen as a regulation of the latter. The same reasoning applies even where, as in the case of 18 U.S.C. § 924(c), the firearms provision is treated as a separate offense (rather than a mere sentence enhancement), as its jurisdictional basis is still that of the other federal offense. See, e.g., United States v. Owens, 996 F.2d 59, 61 (5th Cir. 1993); United States v. Young, 936 F.2d 1050, 1054-55 (10th Cir. 1991); United States v. Dumas, 934 F.2d 1387, 1390 (6th Cir. 1990), cert. denied, 112 S. Ct. 641 (1991); United States v. McDougherty, 920 F.2d 569, 572 (9th Cir. 1990), cert. denied, 499 U.S. 911, 111 S. Ct. 1119, 113 L. Ed. 2d 227 (1991); United States v. Thornton, 901 F.2d 738, 741 (9th Cir. 1990). Section 922(q), with which we are here concerned, is not tied or related to any other federal offense. Also put to one side is legislation dealing solely with specific matters such as national defense, foreign relations, foreign commerce, federal facilities, and use of the mails, none of which are related to section 922(q).

11. See also former 26 U.S.C. § 1132(a); United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 816, 83 L. Ed. 1206 n.1 (1939); Haynes v. United States, 390 U.S. 85, 88 S. Ct. 722, 725, 19 L. Ed. 2d 923 (1968); United States v. Anderson, 885 F.2d 1248, 1250 (5th Cir. 1989).

12. One might speculate that the 1968 repeal of the Federal Firearms Act and the concomitant incorporation of its proscriptions, as then broadened, into the newly enacted

chapter 44 of Title 18, as discussed in detail in the text infra, were prompted by the Supreme Court's 1968 decision in Haynes, which partially invalidated the National Firearms Act on Fifth Amendment, self-incrimination grounds. However, the congressional committee reports on the 1968 legislation do not reflect such a connection, except in respect to Title II of the Gun Control Act of 1968, which amended the National Firearms Act itself to meet the concerns of Haynes. P.L. 90-618, § 201, 90th Cong., 2d Sess. (1968); H.R. Conf. Rep. No. 1956, 90 Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 4426, 4434-35. In 1971 in Freed the Supreme Court sustained the thus amended National Firearms Act, holding that the Haynes problems had been cured.

13. Fugitive from justice was defined to mean one who had fled any state to avoid felony prosecution or testifying in a criminal proceeding. Id. § 901(b).

14. An analogous presumption applied to possession of a firearm with an altered or removed serial number. Id. § 902(i).

15. The presumption considered in Tot was dropped, as was the analogous presumption concerning altered serial numbers (see note 14, supra).

16. See also id. at 2206 (discussing new section 923(a) "The licensing requirements of the present Federal Firearms Act, 15 U.S.C. § 903(a), are based upon dealers and manufacturers (includes importers) shipping or receiving firearms in interstate or foreign commerce. Here, the requirement is on engaging in business and would also include one engaging in such a business in intrastate commerce").

17. Other findings in section 901 of P.L. 90-351 include the following from section 901(a):

> "(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a signficant factor in the prevalence of lawlessness and violent crime in the United States;
>
> . . .
>
> (4) that the acquistiion on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances;
>
> (5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms;
>
> (6) that there is a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior;
>
> . .
>
> (8) that the lack of adequate federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, antitank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern; . . . ."

Findings in section 901(b) are as follows:

> "(b) The Congress further hereby declares that the purpose of this title is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

18. Nelson upheld a conviction under 18 U.S.C. § 922(a)(6) proscribing false statements to a licensed dealer in acquiring a firearm from the dealer if "material to the lawfulness of the sale" under chapter 44; the false statement was that the defendant had not been convicted of a felony, which was "material to the lawfulness of the sale" in that 18 U.S.C. § 922(d)(1) made it unlawful for a licensed dealer to sell a firearm to a felon, regardless of whether the particular sale had a nexus to interstate commerce. Id. at 557-58.

19. The Federal Firearms Act provisions against felons (or indictees or fugitives) shipping or transporting firearms in interstate commerce, 15 U.S.C. § 902(e), against felons (or fugitives) receiving any firearm "which has been shipped in interstate commerce," id. § 902(f), and against any person shipping or transporting stolen firearms in interstate commerce or shipping, transporting, or receiving in interstate commerce firearms with altered or obliterated serial numbers, id. §§ 902(g) & (i), were carried forward without alteration of the interstate nexus, though with slight other alterations, into respectively 18 U.S.C. § 922(e), 922(f) (persons under felony indictment added; presumption removed); 922(g) and 922(i) (presumption removed). The character of ammunition covered was restricted to that used in destructive devices, such as rockets, bombs, or the like. 18 U.S.C. § 921(a)(4), (16). The provision of the Federal Firearms Act against licensed dealers or manufacturers shipping or transporting in interstate commerce to other than licensed dealers or manufacturers where the recipient was required to but did not have a local license, 15 U.S.C. § 902(c), was retained but altered in 18 U.S.C. § 922(a)(2) so that it did not apply to rifles or shotguns but did prohibit almost all interstate shipments by licensed dealers or manufacturers to those who were not licensed dealers or manufacturers.

20. Added Title 18 provisions with an express interstate commerce nexus include: section 922(a)(3) proscribing transportation or receipt by any non-licensee into or within his state of residence of any firearm "obtained by him outside that State" (except for a shotgun or rifle that he could lawfully possess in his state of residence); section 922(a)(4) forbidding any unlicensed person to "transport in interstate or foreign commerce" any "destructive device" (such as a bomb, missile, or rocket, section 921(a)(4)), machine gun, or "sawed off" shotgun or rifle; section 922(a)(5) forbidding transfer or delivery by a person resident in one state to a person (other than a licensed dealer or manufacturer) resident in a different state of any firearm (other than a rifle or shotgun proper under the laws of the latter state); section 924(b) denouncing whoever "ships, transports, or receives a firearm in interstate or foreign commerce" with intent to commit therewith a felony or knowing or with cause to believe a felony is to be committed therewith.

Added Title 18 provisions with an express nexus to federally licensed dealers or manufacturers include: section 922(b) proscribing firearms transfers by licensed dealers or manufacturers to minors (except for shotguns or rifles) (1), or where local law in the state of transfer forbids possession by the transferee (2), or where the transferee resides in another state (except for shotguns or rifles) (3), or of "destructive devices" (bombs, missiles, etc.) or machine guns or "sawed-off" shotguns or rifles (4), in all cases except for transfers to other licensed dealers or manufacturers; section 922(a)(6) forbidding false statements to licensed dealers in acquisition of firearms that are material to the lawfulness under chapter 44 of the acquisition; and section 922(c) forbidding transfer by a licensed dealer or manufacturer to a felon, fugitive from justice, or one under felony indictment.

21. Title II of P.L. 90-618 amended the National Firearms Act at least in part to eliminate the Fifth Amendment self-incrimination problems that the Supreme Court had found in Haynes. See note 12, supra.

22. As enacted by Title IV of P.L. 90-351, section 922(c) prohibited a licensee from selling or disposing of a firearm to a felon, fugitive, or indictee, section 922(e) prohibited any such individual (felon, etc.) from shipping or transporting a firearm in interstate or foreign commerce and section 922(f) denounced any such individual (felon, etc.) who received any firearm that had been shipped or transported in interstate commerce. Title I of P.L. 90-618 shifted these sections to, respectively, section 922(d), (g), and (h), and added to the disqualified individuals adjudicated mental defectives and unlawful users or addicts of various federally controlled drugs. No change was made in the provisions for nexus to interstate or foreign commerce or to a federal licensee.

23. As enacted by P.L. 90-351, section 922(a)(3) prohibited transport or receipt by a non-licensee into or within his state of residence of any firearm (except for a shotgun or rifle he could lawfully possess in his state of residence) "obtained by him outside that state." P.L. 90-618 revised section 922(a)(3) to narrow the shotgun or rifle exception and to add an exception for firearms acquired by testate or intestate succession. As enacted by P.L. 90-351, section 922(a)(5) prohibited non-licensees from transferring any firearm (other than a rifle or shotgun) to a non-licensee resident "in any State other than that in which the transferor resides." P.L. 90-618 revised section 922(a)(5) to eliminate the shotgun or rifle exception and to add exceptions for transfers by testate or intestate succession and for temporary loans "for lawful sporting purposes." In both section 922(a)(3) and section 922(a)(5) the revisions of P.L. 90-618 retained the jurisdictional basis of the prior sections, namely out-of-state acquisition or disposition to a resident of a different state.

24. An exception to this was the addition by P.L. 90-618 of a new section 924(c) (and the concomitant renumbering of the former section 924(c)) enacted by P.L. 90-351 as section 924(d)) providing that any person who used a firearm to commit (or unlawfully carried a firearm during the commission of) "any felony which may be prosecuted in a court of the United States" "shall be sentenced to" one to ten years' imprisonment. While this did not rely for jurisdictional purposes on either interstate commerce or the involvement of a federally licensed party, it was obviously based on the same federal jurisdictional footing as that on which the underlying felony rested. See note 10, supra.

25. As observed in Note 24, supra, there was in section 924(c) (using or carrying a firearm in a federal felony) the separate jurisdictional basis of the underlying federal offense. In 1984, section 924(c) was amended to make the penalty additional to that for the underlying federal offense, to eliminate the element of "unlawfully" from the carrying branch of the offense, and to describe the underlying federal offense as "any crime of violence" (instead of "any felony") "for which he may be prosecuted in a court of the United States." P.L. 98-473, § 1005, 98th Cong., 2d Sess., 98 Stat. 1837, 2138-39. At the same time 18 U.S.C. § 929(a) was enacted providing enhanced punishment for whoever uses or carries a "handgun" loaded with "armor piercing ammunition" during or in relation to "the commission of a crime of violence . . . for which he may be prosecuted in a court of the United States." P.L. 98-473, § 1006, 98 Stat. 2139.

In 1986, in the Firearms Owners' Protection Act, P.L. 99-308, §§ 104(a)(2) & 108, 99th Cong., 2d Sess., 100 Stat. 449, 456-57, 460, §§ 924(c) and 929(a) were amended to add to "crime of violence" any "drug trafficking crime" as occasions on which use of a firearm was prohibited; nevertheless, the offense still had to be one (as it does today) "for which he may be prosecuted in a court of the United States" (§ 924(c)(1); § 929(a)(1)). Also, "drug trafficking crime" was (and is) defined so as to limit it to federal felonies (§ 924(c)(2); § 929(a)(2)); and "crime of violence" was (and is) defined, but its definition did not itself require a federal element (§ 924(c)(3)).

Later in 1986, in P.L. 99-408, § 8, 99th Cong., 2d Sess., 100 Stat. 920, 921, the "handgun" reference in section 929(a) was changed to "firearm," but the jurisdictional basis ("for which he may be prosecuted in a court of the United States") of section 929(a) was not altered.

26. This portion of the BATF assessment reads in full:

> "2. Sales to Prohibited Persons. This bill makes it unlawful for any person, not only licensees, to sell or otherwise dispose of firearms to certain prohibited categories of persons, e.g., a convicted felon. Under existing law it is only unlawful for a licensee to sell or otherwise dispose of firearms knowing or having reasonable cause to believe that such a person is in a prohibited category. This proposal would close an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons." Id.

This amendment to section 922(d) also added to the list of disqualified persons illegal aliens and those who had been

dishonorably discharged or had renounced United States citizenship.

27. The full text of P.L. 99-308 § 1, 100 Stat. 449, is as follows:

> "(a) SHORT TITLE. – This Act may be cited as the 'Firearms Owners' Protection Act'.
> (b) CONGRESSIONAL FINDINGS. – The Congress finds that –
> (1) the rights of citizens –
> (A) to keep and bear arms under the second amendment to the United States Constitution;
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes'."

28. As previously observed, these amendments repealed former 18 U.S.C. § 1202 and incorporated the provisions of former section 1202 into sections 922(g) and (n). Prior to the amendment, sections 922(g) and (h) had not applied to possession as such, but had included those under felony indictment, while section 1202(a) included possession "in commerce or affecting commerce" but did not include those under felony indictment.

29. The grandfather clause in section 922(o)(2)(B) applies only to machine guns "lawfully" possessed before enactment; nevertheless, with respect to those possessed earlier but unlawfully there would be a jurisdictional nexus in the federal law making that earlier possession unlawful, such as the National Firearms Act or various provisions of chapter 44 of Title 18.

30. Farmer did not address the validity of section 922(o).

31. Hale also states: "When it first enacted section 922, Congress found facts indicating a nexus between the regulation of firearms and the commerce power. See Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, 82 Stat. 197, 225 (1968)." Id. 978 F.2d at 1018. The citation given is to the findings in section 901(a) of P.L. 90-351, in connection with Title IV thereof. As previously discussed, those findings (set out in note 17 and accompanying text, supra), and that enactment, with one exception, do no more than speak to the need to regulate both interstate (and foreign) commerce in firearms and federally licensed dealers; the one exception is the finding that for this purpose it is necessary to require intrastate, as well as interstate, dealers to be federally licensed. There is nothing to suggest any finding that mere private party intrastate possession of firearms that have not moved in interstate commerce has any effect on interstate commerce or must be regulated in order to effectively regulate interstate commerce.

In Evans the court stated:

> "Congress specifically found that at least 750,000 people had been killed in the United States by firearms between the turn of the century and the time of the Act's enactment. It was thus reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry. Since Evans does not contend that any specific Constitutional rights are implicated, this rather tenuous nexus between the activity regulated and interstate commerce is sufficient." Id. 928 F.2d at 862.

The Congressional finding alluded to is not contained in the Firearms Owners' Protection Act, and the only similar finding we can locate is that contained in H.Rep. No. 1577 in reference to H.R. 17735, which became the Gun Control Act of 1968. See H.Rep. No. 1577, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 4410 at 4411-15. We have quoted this language in the text, supra, in our discussion of that legislation. Nothing in this committee report mentions insurance or suggests that mere intrastate possession of firearms that have not moved in interstate commerce has any affect on interstate commerce or must be regulated in order to effectively regulate interstate commerce. The committee states that "the proposed legislation imposes much needed restrictions on interstate firearms traffic," id. at 4415 (emphasis added), and that there is "a need to strengthen Federal regulation of interstate firearms traffic." Id. at 4412 (emphasis added). This is consistent with what the legislation did, and it did not (apart from continuing the requirement of the Omnibus Crime Control and Safe Streets Act that intrastate, as well as interstate, dealers be federally licensed) purport to regulate mere private party possession of firearms that had not moved in interstate commerce.

We thus disagree with the general statements in Hale and Evans respecting the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968.

32. Moreover, section 922(p) applies only to nondetectable firearms manufactured in or imported into the United States after its November 10, 1988, enactment, which is suggestive of a closer relation to commerce than mere possession of any firearm whenever and wherever made. Section 922(p)(6). The cited committee report also observes that "No firearms currently manufactured in the United States are known to be subject to the proposed prohibitions." Id. 1988 U.S.C.C.A.N. 5359 at 5363.

33. P.L. 100-690, § 6212, 102 Stat. 4360.

34. The 1988 U.S.C.C.A.N. states respecting the Anti-Drug Abuse Act of 1988 that "No Senate or House Report was submitted with this legislation." Id. at 5937. New section 924(g) was applied in a "crime of violence" context in United States v. Callaway, 938 F.2d 907 (8th Cir. 1991), which observes that it "was designed to curb the supply of firearms used in the commission of drug related and violent crimes,"

but cites no legislative history. Id. at 909. Callaway does not address the validity of section 924(g), its relationship to the regulation of interstate commerce, or any express or implied Congressional findings related thereto, nor whether the offense there had an interstate or other jurisdictional nexus (though the facts recited suggest none).

35. Nor to section 929(a)(1) denouncing possession of armor piercing ammunition during or in relation to "a crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States."

36. Senior Judge, We also observe that the other additions to chapter 44 of Title 18 made by subtitle G of Title VI of the Anti-Drug Abuse Act of 1988 expressly provided for an interstate commerce or other federal nexus. Thus, new section 924(f), P.L. 100-960, § 6211, 102 Stat. 4359, denounces whoever "travels from any State or foreign country into any other State" and acquires or transfers "a firearm in such other State" with the purpose of engaging in conduct constituting any of various offenses including "a crime of violence (as defined in subsection (c)(3))." New section 930, P.L. 100-960, § 6215, 102 Stat. 4361, denounces "whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility."

37. Section 1702 also added to section 921(a) new subsections (25), (26), and (27) defining terms used in new section 922(q) ("school zone," "school," and "motor vehicle") and added to section 924(a) new subsection (4) fixing the penalty for violation of new section 922(q).

38. Public Law 101-647 § 2201 amended section 922(a)(5), which formerly proscribed (with exceptions) transfer of a firearm by a nonlicensee to a nonlicensee who "resides in any state other than that in which the transferor resides" (or that in which the place of business of the transferor, if a business entity, is located) so that it proscribed (with the same exceptions) such a transfer if the nonlicensee transferee "does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides." The purpose of this was apparently to include among disqualified transferees "an alien or transient who does not reside in the State in which the transferor resides." H.Rep. No. 101-681(I), 101st Cong., 2d Sess., at 106, reprinted in 1990 U.S.C.C.A.N. 6472 at 6510. It also appears to have the effect of clarifying section 922(a)(5) by removing its otherwise arguable prohibition of transfer to a nonlicensee business entity having a place of business in the transferor's state of residence but existing under the laws of and having its principal place of business in a different state.

Also, Public Law 101-647 § 2202(a) amended section 922(j), which prohibited any person from receiving, concealing, disposing of, pledging, or accepting as security any stolen firearm "moving as, which is a part of, or which constitutes, interstate or foreign commerce," by expanding it to also cover any stolen firearm "which has been shipped or transported in, interstate or foreign commerce." H.Rep. No. 101-681(i), supra, explains that the amendment will "permit prosecution . . . where the firearms have already moved in interstate or foreign commerce." Id. at 106, 1990 U.S.C.C.A.N. at 6510.

Further, Public Law 101-647 § 2202(b) amended section 922(k), which made it unlawful "to transport, ship or receive, in interstate or foreign commerce" any firearm whose serial number had been removed, altered, or obliterated, by expanding it to also make it unlawful "to possess or receive" any such firearm that "has, at any time, been shipped or transported in interstate or foreign commerce."

And, Section 2204 of P.L. 101-647 added section 922(r) making it "unlawful for any person to assemble from imported parts" any rifle or shotgun "identical" to any "prohibited from importation under section 925(d)(3)." House Report 101-68(I), supra, reflects that this amendment "is to prevent the circumvention of the importation restrictions by persons who would simply import the firearms in a disassembled form and then reassemble them in the United States." Id. at 107, 1990 U.S.C.C.A.N. at 6511.

Finally, section 2205 of P.L. 101-647 amended section 930, which denounced possession of firearms "in a Federal facility," so that an enhanced penalty would be applicable if the possession were "in a Federal court facility."

39. Rep. William Hughes, the Chairman of the Subcommittee on Crime of the House Judiciary Committee, made the same point in a colloquy with Richard Cook, the Chief of the BATF's Firearms Division, during the hearings on H.R. 3757:

> "Mr. Hughes. This would be a major change, would it not, in Federal jurisdiction, in that basically, we've played a supportive role in endorsement of gun laws throughout the country, supportive of local and State efforts to attempt to license and, as a matter of fact, to restrict and punish. This would, it seems to me, put us in the position of, for the first time, playing a direct role in the enforcement of a particular Federal law – a gun law – at the local level, the school district level.
>
> Mr. Cook. ATF has always been involved with supporting State and local people in their prosecutions.
>
> Mr. Hughes. I say that's been our role – as supportive. Does this give us the original jurisdiction?
>
> Mr. Cook. In this particular instance, this legislation would give us original Federal jurisdiction, which would –
>
> Mr. Hughes: That would be a major departure from basically what has been the practice of the past.
>
> Mr. Cook. As far as schools as concerned, yes, it is.
>
> Mr. Hughes. A major departure from a traditional federalism concept which basically defers to State and local units of government to enforce their laws.
>
> Mr. Cook. Yes."

House Hearings, supra, at 14.

40. See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), where the Court noted that the "discriminatory practices" the regulation of which it sustained were "now found substantially to affect interstate commerce," id. at 355 (emphasis added), and that under the Commerce Clause Congress' regulatory powers extend to "local activities . . . which might have a substantial and harmful effect upon" interstate "commerce." Id. at 358 (emphasis added).

41. Perez does contain the statement that: "We have mentioned in detail the economic, financial, and social setting

of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate." Id. at 1362. No citation of authority is given, nor is the meaning of the second sentence entirely clear. However, the opinion as a whole shows extensive consideration of and reliance on not only the evidence before Congress and the legislative history, but also the formal Congressional findings, which the Court had already observed were "quite adequate" to sustain the act. Id.

42. Similarly, in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), the Court upheld the same act "as applied here to a motel which concededly serves interstate travelers." Id. at 360. The Court noted that the act, by its express terms, applied to an establishment "if its operations affect commerce," which was defined to include "any inn, hotel, motel, or other establishment which provides lodging to transient guests." Id. at 352-53. It observed that statute was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved." Id. at 355. In sustaining the act as applied the Court stated:

> "While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S.Rep. No. 872, supra; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 of the Committee on the Judiciary on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H.R.Rep. No. 914, supra. . . . We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel" Id. at 355.

43. We know of no Supreme Court decision in the last half century that has set aside such a finding as without rational basis. However, the Court has never renounced responsibility to invalidate legislation as beyond the scope of the Commerce Clause. See, e.g., Maryland v. Wirtz, 392 U.S. 183, 88 S. Ct. 2017, 2025, 20 L. Ed. 2d 1020 (1968) ("This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the states."). Nor may we renounce that duty.

44. Conceivably, a purely informational void could be filled by evidence in court of the same general kind that might have been presented to a Congressional committee or the like concerning any relationship between the legislation and interstate commerce. However, in such a situation the court could only guess at what Congress' determination would have been. In any event, there is no such evidence here.

45. We recognize that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Cloyd W. Miller Co., 333 U.S. 138, 68 S. Ct. 421, 424, 92 L. Ed. 596 (1948). But in that case, the Court went on immediately to say: "Here it is plain from the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause." Id. (footnote omitted). See also id. at 423 ("The legislative history of the present Act makes absolutely clear that there has not yet been eliminated the deficit in housing which in considerable measure was caused by the heavy demobilization of veterans and by the cessation or reduction in residential construction during the period of hostilities due to the allocation of building materials to military projects"; footnote omitted). The Court proceeded to sustain the legislation under the war power. Here, by contrast, the legislative history does not show that Congress, in enacting the Gun-Free School Zones Act, was invoking the Commerce Clause.

46. It is also conceivable that some applications of section 922(q) might raise Second Amendment concerns. Lopez does not raise the Second Amendment and thus we do not now consider it. Nevertheless, this orphan of the Bill of Rights may be something of a brooding omnipresence here. For an argument that the Second Amendment should be taken seriously, see Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989).

47. As we have observed (note 42, supra), in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), the Court upheld section 201(b)(1) & (c) of Title II of the Civil Rights Act of 1964, respecting hotels, motels, and inns, as a proper exercise of the commerce power, relying on the wording of the statute and its legislative history. The Court distinguished the Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883), which had stricken down the Civil Rights Act of 1875. The Heart of Atlanta opinion observes that the opinion in Civil Rights Cases "specifically . . . noted that the Act was not conceived in terms of the commerce power." Heart of Atlanta, 85 S. Ct. at 354. The Heart of Atlanta opinion also in this connection contrasts the 1875 and 1964 acts:

> "Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in 'inns, public conveyances on land or water, theaters, and other places of public amusement,' without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved." Id. at 354.

The suggestion is that it is questionable whether an act which has neither an express or facial commerce nexus nor legislative history demonstrating such a nexus may be sustained as an exercise of the commerce power.

In a similar vein, we note that in Woods v. Cloyd Miller Co., 333 U.S. 138, 68 S. Ct. 421, 92 L. Ed. 596 (1946), the Supreme Court, relying on legislative history (see note 43, supra), sustained the Housing and Rent Act of 1947, which essentially contained a form of nationwide federal rent control, on the basis of the war power. The legislation did not expressly invoke the war power, but the Court sustained it on that basis, relying on legislative history, despite the Court's recognition that this principle should not extend long after the end of hostilities, as if it did "it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well." Id. at 424. Significantly, the Court never mentioned the Commerce Clause. Moreover, the Court's referenced concern seems to implicitly assume that the Commerce Clause would not reach so far.

48. The Court then quoted extensively from Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). The Will Court had stated:

"If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985); . . . Atascadero was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947), or if it intends to impose a condition on the grant of federal moneys, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16, 101 S. Ct. 1531, 1539, 67 L. Ed. 2d 694 (1981); South Dakota v. Dole, 483 U.S. 203, 207, 107 S. Ct. 2793, 2795, 97 L. Ed. 2d 171 (1987). 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' United States v. Bass, 404 U.S. 336, 349, 92 S. Ct. 515, 523, 30 L. Ed. 2d 488 (1971)." Id. at 2308-09.

49. Thus, we are not faced with a situation such as that addressed by Justice Powell in his concurrence in Fullilove v. Klutznick, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980). See id. at 2787 (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").

See also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (plurality opinion), in which the Court held unconstitutional Richmond's plan requiring thirty percent of public subcontracting work to be given to minority-owned business, in part because of the city's failure adequately to supports its "finding" that past discrimination necessitated race-conscious remedial action. Specifically, the Court rejected the city's reliance upon findings made by Congress (and used by the Court to sustain a similar federal racial set-aside in Fullilove) that there had been nationwide discrimination against blacks in the construction industry, saying that "the probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited." Id. at 727. Further, the Court saw "absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." Id. at 728 (original emphasis).

50. We reject two related arguments by the government in this connection. First it urges that section 922(q) "is not fundamentally different from the 'schoolyard statute,' 21 U.S.C. § 860, which provides greater punishment for drug offenses occurring within 1000 feet of a school." However, this statement ignores the fundamental difference that all drug trafficking, intrastate as well as interstate, has been held properly subject to federal regulation on the basis of detailed Congressional findings that such was necessary to regulate interstate trafficking. See United States v. Lopez, 459 F.2d 949, 951-53 (5th Cir.), cert. denied sub nom. Llerena v. United States, 409 U.S. 878, 93 S. Ct. 130, 34 L. Ed. 2d 131 (1972). Thus, section 860 is not a regulation of schools but of drugs, and its jurisdictional foundation is the now unchallenged federal authority over intrastate as well as interstate narcotics trafficking. See cases cited in note 10, supra.

Second, the government urged the district court that "the federal government has provided thousands and thousands of dollars in federal educational grant moneys to the San Antonio Independent School District . . The federal government is entitled to protect its investment in education . " We reject this contention. Although Congress may attach conditions to the receipt of federal funds, it must do so unambiguously. See South Dakota v. Dole, 483 U.S. 203, 107 S. Ct. 2793, 2796, 97 L. Ed. 2d 171 (1987); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 1540, 67 L. Ed. 2d 694 (1981). We cannot view section 922(q) as a condition meant to "protect the federal investment in schools," as the government puts it, because Congress has in no way tied section 922(q) to federal funding. Section 922(q), which expressly extends to "private" and "parochial" as well as "public" schools, does not even mention federal funding, and applies whether or not such funding is received.

51. The government also urges that we have sustained the prohibition of all simple narcotics possession. See United States v. Lopez, 461 F.2d 499 (5th Cir. 1972) (per curiam). However, there we relied on our decision in the earlier, different Lopez case, 459 F.2d 949, where we in turn relied on Congressional findings that such was necessary to effectively regulate the interstate trafficking in narcotics. The possession proscription was a necessary means to regulate the interstate commercial trafficking in narcotics. There is nothing analogous in the present case. Section 922(q) is not related (either in terms or by legislative findings or history) to the regulation of interstate trafficking in firearms or to any scheme for such purpose, and there has been no general outlawing of the possession of ordinary firearms by ordinary citizens. Moreover, firearms do not have the fungible and untraceable characteristics of narcotics.

52. No other basis for section 922(q) has been suggested.

53. Cf. Heart of Atlanta, 85 S. Ct. at 360 ("We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution.") (emphasis added). However, the "as applied" issue has not been briefed or argued with respect to section 922(q) and, as noted, we expressly do not resolve it.

54. Because we reverse Lopez's conviction, we do not reach the challenge he raises to his sentence.