9-1995

Section 9: Criminal Law

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

94-8729 BENNIS v. MICHIGAN

Nuisance abatement—Forfeiture—Due process.

Ruling below (Mich SupCt, 447 Mich. 719):

State nuisance abatement law that permits forfeiture of married couple's jointly owned car, use and possession of which wife explicitly or implicitly entrusted to husband, on basis of husband's use of car for unlawful purpose without wife's acquiescence or consent does not violate Fourteenth Amendment's Due Process Clause.

Questions presented: (1) Does Michigan nuisance abatement statute that permits forfeiture of person's property if it is used in proscribed manner by another person even if owner has no knowledge of misuse of property violate Fourteenth Amendment's Due Process Clause or Fifth Amendment's Takings Clause? (2) Does application of that statute to deprive wife of her interest in automobile that she jointly owned with her husband violate Due Process Clause or Takings Clause when forfeiture resulted from finding that husband engaged in sex act with prostitute inside automobile, and when record established that wife had no knowledge that her husband would use car in such manner?

Petition for certiorari filed 3/29/95, by Stefan B. Herpel, of Ann Arbor, Mich.

MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Plaintiff-Appellant,

v.

John C. BENNIS and Tina B. Bennis, Defendants-Appellees.

No. 97339.

Supreme Court of Michigan.

527 N.W.2d 483, 447 Mich. 719

Argued Oct. 5, 1994.

Decided Dec. 30, 1994.

RILEY, Justice.

In this case, we are required to construe various aspects of the nuisance abatement statute. Specifically, we must decide whether an act of prostitution was consummated absent proof that money was exchanged. Next, we must determine whether the trial court erred in abating a vehicle used to commit an act of prostitution in a neighborhood with a reputation for illicit activity. Finally, we must consider whether a co-owner's interest in a vehicle may be abated where the co-owner allegedly had no knowledge that the vehicle was used in proscription of the statute.

We would hold that lewdness, incidental to an act of prostitution, is activity squarely within the purview of the nuisance abatement statute. Alternatively, we conclude that proof of an exchange of money is not necessary where, as here, it is clear from the totality of circumstances that the sexual act was in exchange for payment. Additionally, we would uphold the abatement of this vehicle because the defendant entered a neighborhood that is a known place for prostitution and used his vehicle to engage in illicit activity, thereby contributing to the existing nuisance. Finally, pursuant to the clear and unambiguous language of the statute, we would hold that knowledge or consent is not required to abate the interest of a co-owner.

I

John Bennis was arrested for gross indecency on the evening of October 3, 1988. On that evening, Detroit police officers Jacob Anthony and John Howe set up surveillance after they witnessed a woman "flagging" passing vehicles on the corner of Eight Mile and Sheffield. The woman was later identified as Kathy Polarchio. The officers next observed a 1977 Pontiac, driven by a man, later identified as John Bennis, turn onto Sheffield and stop near Ms. Polarchio, who approached and entered the passenger side of the Pontiac. The officers followed the Bennis vehicle, which proceeded a block, made a U-turn, and stopped. Surveillance continued until the officers noticed Ms. Polarchio's head disappear toward the driver's side of the Pontiac. The officers immediately approached the Bennis vehicle, shined a flashlight into the front seat, and witnessed Ms. Polarchio performing an act of fellatio on Mr. Bennis.

Mr. Bennis was convicted of gross indecency in violation of M.C.L. §750.338b; M.S.A. §28.570(2). The Wayne County prosecutor then filed a complaint alleging that the Bennis vehicle was a public nuisance subject to abatement pursuant to M.C.L. §600.3801; M.S.A. §27A.3801. The vehicle was co-owned by Mr. Bennis' wife, Tina Bennis, who claimed that she had no knowledge that her husband ever used their vehicle in violation of the statute. The trial judge held that the vehicle was a nuisance and abated the interest of defendant and his wife.

* * *

III

As noted above, M.C.L. §600.3801; M.S.A. §27A.3801 provides for the abatement of a vehicle used for the purpose of lewdness, assignation, or prostitution. However, the statute does not define the extent of activity required to constitute a nuisance. Therefore, we must next determine whether an act of prostitution committed in a neighborhood known for illicit activity is within the purview of the statute.

A

Although the issue has not been resolved by appellate decisions of this state, an attempt was made to clarify the definition of nuisance in Motorama Motel. . . .Motorama held that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." However, Motorama 's reliance on Bitonti is belied by the fact that only four of the eight justices in Bitonti held that a single act was sufficient to constitute an abatable nuisance.

As a result, existing Michigan precedent does not specifically require more than a single incident of conduct. However, cognizant of the activity that has implicitly constituted a nuisance in previous actions, we must determine whether the activity in this case properly falls within the definition of nuisance as used in M.C.L. §600.3801; M.S.A. §27A.3801.

B

Because the public nuisance statute allows the abatement of property used in a proscribed manner without specifying the activity that will constitute a nuisance, we are aided in the definition of a nuisance by general public nuisance law. This Court has defined a public nuisance as involving "not only a defect, but threatening or impending danger to the public. . . ." Similarly, this Court has declared a public nuisance where an act "offends public decency."

* * *

C

In construing the nuisance abatement statute, "effect must be given, if possible, to every word, sentence and section." Moreover, to discover the legislative intent, "the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole.". . .

* * *

Several members of that neighborhood testified about numerous incidents where they had personally been accosted and solicited. The arresting officer confirmed that many arrests for prostitution were made in that neighborhood. Several neighbors testified that they had been solicited on more than one occasion. One witness testified that he had observed acts of prostitution near the corner of Eight Mile and Gardendale and that on one occasion he found his young son staring at strange vehicles parked near that corner in which men and women were apparently committing acts of prostitution. These incidents reflect concerns identical to those cited in Garfield and Bloss.

Thus, the present case involves a condition that, on the basis of the record below, is a public nuisance in this neighborhood. It cannot be contested that a significant threat to public peace and safety exists in the Eight Mile and Sheffield neighborhood. Vehicles that enter the neighborhood in order to solicit acts of prostitution are being "used for" the continuance of this nuisance. Therefore, we would hold that the nuisance abatement statute allows the abatement of a vehicle where the driver entered into and thereby contributed to an existing condition that is a public nuisance.

* * *

E

* * *

As previously stated, the nuisance abatement statute has remained virtually unchanged since Robinson, and our position therefore would apply a priori to the present case. The one act of prostitution in Robinson was considered with regard to the general reputation of the entire building. Similarly, the one act of nuisance by Mr. Bennis in his vehicle must be viewed in light of the larger and continuing nuisance occurring in the neighborhood. Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. To hold otherwise would allow the criminal actors to circumvent the statute where a different vehicle was used in the commission of each offense. The result would permit the continuing blight of neighborhoods, contrary to the clear intent of the statute. Accordingly, we would hold that the Court of Appeals erred in concluding that the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution was not an abatable nuisance.

IV

Finally, we consider whether a co-owner's interest in a vehicle may be abated where the co-owner had no knowledge that the vehicle was used in a manner proscribed by the nuisance abatement statute. Despite the clear and unambiguous language of the statute indicating that a property owner's knowledge or consent is not required, decisions of this state have nonetheless reached different conclusions with respect to this issue. We would resolve the conflict and would hold that knowledge is not required.

* * *

B

Finally, therefore, we consider the constitutional significance of the abatement of Mrs. Bennis' interest in the vehicle. We assume, arguendo, that Mrs. Bennis did not have knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner. Historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied. As recently as the landmark forfeiture case, Calero-Toledo v. Pearson Yacht Leasing Co, the United States Supreme Court has reflected this view: "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."

* * *

Applying the principles of Van Oster and Calero, it is evident that Mrs. Bennis' claim is without constitutional consequence. Mrs. Bennis was a joint owner who explicitly or implicitly entrusted Mr. Bennis with the use and possession of their vehicle. Van Oster, supra. It is clear from Calero that the abatement of property stolen from the owner or taken without the owner's knowledge would be prohibited. However, on the basis of the facts before us, the argument cannot be made that the vehicle was stolen or initially driven without Mrs. Bennis' knowledge.

* * *

Review of the controlling cases persuades us that no constitutional violation results from the abatement of Mrs. Bennis' interest in the vehicle. The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner. Van Oster; Calero, supra. Other jurisdictions addressing the issue have allowed the abatement of a co-owner's interest on strikingly similar facts. The Michigan nuisance abatement statute specifically obviates the requirement of proof, and because the statute does not violate the constitution, the Court of Appeals incorrectly held that proof of knowledge of the proscribed activity is required. Additionally, we do not find that the trial judge abused his discretion in fashioning an appropriate remedy, abating the entire interest of the vehicle.

V

In summary, we would hold that an act of lewdness as defined herein occurred and made the vehicle abatable. Moreover, reviewing the entire record, we find that an act of fellatio occurred so as to create a clear inference that it was for monetary compensation. Proof of an actual exchange of the money is not required by the statute or decisions of this Court. Thus, alternatively, we would hold that a complete act of prostitution occurred in the Bennis vehicle. Additionally, because the act occurred in a neighborhood that was a place reputed for prostitution and therefore a public nuisance, Mr. Bennis' vehicle contributed to that continuing nuisance and may be abated. Finally, we would hold that the clear and unambiguous language of the Michigan nuisance statute obviates the requirement of an owner's knowledge of the proscribed activity and that the statute unquestionably passes constitutional muster. For all of the foregoing reasons, we would reverse the decision of the Court of Appeals.

MICHAEL F. CAVANAGH, Chief Justice (dissenting). [Omitted.]

LEVIN, Justice (dissenting). [Omitted.]

PROPERTY SEIZURE UNDER FIRE, ALTHOUGH LAWS ARE SPREADING

Detroit Free Press
Wednesday June 7, 1995

David Zeman, Cecil Angel
Free Press Staff Writers

Your husband gets busted with a prostitute in the family Buick. Boom, the car is grabbed by police.

Your hubby then gets his third drunken-driving arrest in the family Mustang. Pow, your muscle car is history as well.

You're devastated. After all, those cars cost money.

But, in many cases, the government can seize and sell your car at auction under laws either passed or under consideration in Michigan and across the country. Even if you own the vehicle with your husband -- or wife. And even if you knew nothing of your spouse's vices.

On Monday, the U.S. Supreme Court agreed to review a Detroit case that will test a troubling aspect of many forfeiture laws: whether the U.S. Constitution permits the government to seize a person's property even when that person was unaware the property was being used illegally.

The court challenge comes as several Detroit area communities have passed laws allowing the seizure of cars used by repeat drunken drivers. A similar measure sponsored by state Sen. Michael Bouchard, R-Birmingham, has passed the state Senate and is awaiting action in the House.

"Here's where you really can get the attention of a stubborn mule by hitting him with a two-by-four," said Mayor Robert Bennett of Livonia, where a drunken-driving forfeiture ordinance was passed Monday. The Livonia law makes no distinction between the drunken driver and the family member who may co-own the car. As Bennett put it, "the wife must stand in the shoes" of her inebriated husband.

Under any of these laws, people who lend their cars to friends who drive drunk would lose their vehicles only if they knew their friends were intoxicated. Leasing companies also likely would be exempt.

The Detroit case before the Supreme Court addresses a different vice but similar issues. It stems from the 1988 arrest of John Bennis under a state nuisance law. In that case, police seized Bennis' car after he was found having sex with a prostitute in it. Tina Bennis, John's wife and co-owner of the car, argued that the law was unconstitutional because it didn't exempt owners who were unaware their property was being used illegally.

Other Detroit area police have used the nuisance law. In Pontiac on Saturday, police seized 18 vehicles during a prostitution sting along Clark Street, a stretch of road they contend is overrun by men soliciting sex. The sting was strongly supported by Pontiac Councilman Everett Seay, who said men are otherwise able to pay fines and hide their arrests from family members and friends. "I think they'll think twice," Seay said.

Critics, though, say these forfeiture laws raise serious constitutional concerns. Chief among them: That it is unconstitutional and fundamentally unfair to take property from an innocent person without compensation.

The Michigan nuisance law, enacted during Prohibition, states that it's irrelevant whether the person who owns the property knows that it was being used for illegal activities such as gambling, prostitution or the like. The law was more concerned with ending the nuisance than with punishing the individual. So if a building was used for gambling, or if a car was used for bootlegging, the answer was to get rid of the building or the car.

But the law is at odds with many modern-day federal drug forfeiture laws, which exempt owners who were unaware their property was being used for illegal purposes.

Critics also say these laws punish people twice, in violation of the constitutional ban on double jeopardy. They argue that it is improper to first prosecute someone for soliciting a prostitute or driving drunk and further punish them by taking away their vehicle.

Critics add that the laws also may violate the Constitution's Eighth Amendment ban on excessive fines.

"The question becomes, what happens when we seize a $30,000 Corvette?" said George Constance, the city attorney for Warren, which recently passed a drunken-driving forfeiture law over his objection.

But Bouchard said his measure addresses most of these concerns. Under his bill, a judge would have some discretion on whether to forfeit a vehicle once the owner is convicted twice for drunken driving or a third time for driving while impaired. But if a person is convicted a third time for drunken driving or a fourth time for being impaired, seizure is mandatory.

Bouchard said his measure is fair because the forfeiture does not take place until after the person is convicted. Moreover, a vehicle co-owner is entitled to half the proceeds from the forfeiture if that person did not know the offender was driving drunk.

"Complete due process is totally observed," Bouchard said.

SUPREME COURT AGREES TO HEAR DISPUTE ON SEIZED AUTOMOBILE
Protection Against Property Forfeitures May Be Widened

The Washington Post
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Tuesday, June 6, 1995

Joan Biskupic
Washington Post Staff Writer

The Supreme Court agreed yesterday to hear the case of a woman demanding restitution for her 1977 Pontiac, which was seized by Detroit police when they caught her husband romancing a prostitute in the front seat.

While the case offers the Supreme Court one of its more salacious sets of facts, it may also lead to new protection for potentially innocent owners who lose their property through forfeiture. The court in recent cases has limited the use of property forfeiture laws, which are potent weapons and money-makers for states and the federal government.

In the new case, Tina Bennis argues that her constitutional right to due process was violated when she lost her car because of the extracurricular activities of her husband, John Bennis.

Tina Bennis testified that she provided most of the money to buy the Pontiac, from baby-sitting and odd jobs. She said that she knew nothing about her husband soliciting prostitutes and that on the day he was arrested, in October 1988, she thought he was returning home straight from work.

But police were keeping tabs on Bennis after a surveillance team saw him pick up a prostitute and drive her to a dark residential street. When officers who had tailed him shined a flashlight into the car, they found the prostitute performing oral sex on Bennis.

Bennis was convicted of gross indecency and the Wayne County prosecutor seized and sold the Pontiac under a Michigan nuisance law that allows forfeiture of vehicles used for lewdness or prostitution.

On appeal, the Michigan Supreme Court upheld the forfeiture action, saying the 1925 anti-nuisance law expressly states that an owner need not have known or consented to illegal use of the property. "Historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied," the Michigan high court said.

In Bennis's appeal to the U.S. Supreme Court, her lawyer notes that justices have raised concerns in recent forfeiture cases about the seizure of a truly innocent owner's property.

"At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent," Justice Anthony M. Kennedy said in a 1993 case. "That for me would raise a serious question."

Although the forfeiture provisions of federal law usually exempt innocent owners, a ruling in the Bennis case could set greater protections overall for state and federal seizures.

The Bennises are still married. Tina Bennis's brief coolly notes that although her husband jointly owned the car, he has not joined her appeal to the Supreme Court.

"She has a deep conviction that what the Wayne County prosecutor did was wrong here and it was important enough to her to override any other personal considerations" in appealing the case, said her lawyer, Stefan B. Herpel.

State prosecutors in Bennis v. Michigan argue that "the offending property" can be seized regardless of the innocence of an owner.

Separately yesterday, the court ruled 8 to 1 that time spent in a halfway house cannot be counted toward the defendant's overall prison sentence.

Ziya Koray, who had pleaded guilty in a federal court in Baltimore to money laundering, was released on bail to a halfway house while awaiting sentencing. He was confined 24 hours a day for the three-month interim.

The court, in an opinion by Chief Justice William H. Rehnquist, said such restrictive bail is not "official detention" under federal law and cannot be counted toward Koray's prison sentence of 41 months. Justice John Paul Stevens dissented in Reno v. Koray.

94-6615 THOMPSON v. KEOHANE

Habeas corpus—State court findings—Determination of when suspect is in custody.

Ruling below (CA 9, 8/11/94, unpublished):

State court's determination that defendant was not in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), is question of fact entitled to presumption of correctness under 28 USC 2254(d) and may be disturbed on federal habeas corpus only if it lacks fair support in record or statutory exception to presumption of correctness applies.

Question presented: What standard of review should appellate court employ when there is conflicting caselaw on standard of review of when suspect has been taken "into custody," triggering requirement that Miranda warnings be administered?

Petition for certiorari filed 10/31/94, by Carl Thompson, pro se, of Lompoc, Calif.

Carl THOMPSON, Petitioner-Appellant,

v.

Patrick KEOHANE, Warden;

Charles E. Cole, Attorney General, State of Alaska, Respondent-Appellee.

No. 94-35052.

United States Court of Appeals, Ninth Circuit.

34 F.3d 1073

Unpublished Disposition

Argued and Submitted Aug. 5, 1994.

Decided Aug. 11, 1994.

AFFIRMED.

MEMORANDUM

Carl Thompson appeals the district court's denial of his petition for writ of habeas corpus. Thompson alleges that his incarceration violates the Constitution because the state trial court admitted statements that Thompson argues were obtained in violation of his Miranda rights and a confession that he argues was involuntary. We affirm.

I.

We recently have held that a state court's determination that a defendant was not in custody for purposes of Miranda is a question of fact entitled to the presumption of correctness under 28 U.S.C. §2254(d). Thompson has not shown, and it does not otherwise appear, that any of the exceptions to the presumption, apply in this case. Accordingly, we may only disturb the state court's factual determination if it lacks even fair support in the record.

We have reviewed the entire transcript of Thompson's interrogation. Thompson voluntarily appeared at the trooper headquarters. During the interrogation, the troopers assured him several times that he was free to terminate the interview and leave. Indeed, even after he confessed, Thompson was permitted to leave when the interview was complete. "Fair support" exists for the state court's determination that Thompson was not in custody for Miranda purposes.

II.

We review de novo the question whether, considering the totality of the circumstances, Thompson's will was overborne through psychological pressure rendering his confession involuntary. We have independently evaluated the transcript of Thompson's interrogation and conclude that, the cumulative effect of those tactics did not overbear Thompson's will.

AFFIRMED.

COURT TO HEAR ALASKA CASE ON SUSPECTS' RIGHTS

Anchorage Daily News
Tuesday, January 24, 1995

Laurie Asseo
The Associated Press

Washington - The Supreme Court on Monday agreed to use an Alaska case to clarify the standard that federal courts must use in deciding whether police violated criminal suspects' rights when taking their statements.

The court agreed to hear arguments by Carl Thompson, serving a life sentence for a first-degree murder conviction in the beating and stabbing death of his ex-wife.

Thompson contends police coaxed him into confessing to the crime without giving him the standard "Miranda" warning of his right to remain silent and to have an attorney.

On Sept 10, 1986, two moose hunters found Dixie Gutman's body floating in a pit 20 miles north of Fairbanks. She had been severely beaten and stabbed 29 times.

Police asked Thompson to come to the station for questioning. At first he denied involvement in his ex-wife's killing, but he eventually confessed, saying he killed her because the two had been arguing and he feared she was going to shoot him.

Police did not give Thompson the Miranda warning, and he was allowed to leave after the interview. But he was arrested a few hours later, and eventually was convicted of murder in state court.

Alaska state courts upheld his conviction. In his appeal to federal court, Thompson argued that his confession should have been barred as trial evidence because he was not given the Miranda warning.

But a federal judge said Thompson was not in police custody when he made the statement and thus was not entitled to the warning.

Police repeatedly told him he was not under arrest and could leave at any time, the judge said.

The 9th U.S. Circuit Court of Appeals upheld that ruling.

In his high court appeal, Thompson is asking the justices to decide whether federal courts should conduct an independent review of such questions based on uniform federal standards.

State courts are not necessarily in a better position to review whether someone was in police custody at the time a confession was made, he said.

Alaska prosecutors said such questions should be considered issues of fact to be decided by trial judges. They added that evidence of Thompson's guilt was overwhelming and that admission of his confession would be considered harmless.

HOW MANY CRIMINALS HAS MIRANDA SET FREE?

The Wall Street Journal

Wednesday, March 1, 1995

Paul G. Cassell

When the Senate Judiciary Committee holds hearings next week on reforming the criminal justice system, its main target should be the outdated and harmful Miranda rules. As anyone who has ever watched a cop show on TV knows, the Supreme Court's 1966 decision in Miranda v. Arizona requires police to warn suspects of their right to remain silent; less well known is that Miranda also obligates police to follow a series of procedural requirements for obtaining admissible confessions. These rules have hurt law enforcement's ability to prosecute dangerous criminals.

The best information on Miranda's harms comes from the before-and-after studies of confession rates in the wake of the decision. A study in Pittsburgh revealed that confession rates there fell from 48% before the decision to 29% after. New York County (Manhattan) District Attorney Frank Hogan reported that confessions fell even more sharply, from 49% before Miranda to 14%. Similar results were reported in Philadelphia, Kansas City, Brooklyn, New Orleans, and Chicago.

I have recently combined all of the available before-and-after data in jurisdictions that complied with Miranda's procedural requirements. In many of these jurisdictions, police were advising suspects of their rights even before Miranda. But after all the Miranda procedural rules were imposed, confession rates declined by 17 percentage points, from roughly 50% to 33%.

Confirming the decline in confession rates in this country is evidence from Britain. Until 1986, British police told suspects they had the right to remain silent but did not follow the other, particularly onerous, features of the Miranda system, such as the right to counsel during questioning and the requirement that a suspect affirmatively agree to talk to police. Under these rules, British police obtained confessions in 61% to 85% of cases. The same result is seen in Canada, where the police obtain confessions about 70% of the time.

The British experience not only lets us assess confession rates without the Miranda rules, but also allows us to review what happens as a country moves to a Miranda-style regime. In 1986, Britain adopted a heavily regulated structure for police interrogations that followed Miranda in many respects. Since then, British confession rates have declined toward U.S. levels. Studies suggest that British confession rates have fallen to about 45%. In part because of these falling confession rates, Parliament in November changed the warning given to suspects and modified other rules to encourage more confessions.

Of course, falling confession rates would be of little concern if prosecutors could convict using other available evidence. However, the literature suggests that in the U.S. confessions or incriminating statements are needed to obtain a conviction in about 24% of cases.

To my knowledge, no one has attempted to quantify the number of criminal cases that are lost each year because of Miranda. Yet it is possible tentatively to calculate such a cost using the available information. Multiplying the 17-percentage-point reduction in the confession rate after Miranda by the 24% need for confessions suggests that 4.1% of all criminal cases will be "lost" -- that is, cannot be successfully prosecuted -- because of the Miranda requirements. (By way of comparison, the exclusionary rule results in the loss of somewhere between 0.6% and 2.4% of all cases.)

The costs in absolute numbers of lost cases are staggering. Each year Miranda results in lost cases against approximately 30,000 violent criminals and 90,000 property offenders for FBI-indexed crimes. In addition, prosecutors lose cases against 62,000 drunk drivers, 46,000 drug dealers and users, and several hundred thousand lesser criminals. About the same number of cases have to be plea-bargained on terms more favorable to defendants because prosecutors are in weaker bargaining positions without confessions.

These costs are entirely unnecessary. Miranda's defenders have long argued that any change in the decision's requirements would roll back the clock. But time has passed Miranda's defenders by -- they are advocating a 1960s approach to preventing coerced confessions when the 1990s offer superior solutions.

Congress should consider scrapping the Miranda rules that depress the confession rate, particularly the requirements that police obtain a suspect's affirmative agreement to be questioned (a waiver of rights) and that questioning stop immediately whenever a suspect says the word "lawyer." Instead, police could be required to videotape all custodial interrogations while observing the Fifth Amendment's prohibition against coercion.

Videotaping would deter genuine police misconduct more effectively than Miranda by creating a clear record of police and suspect demeanor during

questioning. To be sure, police can turn off video cameras or deploy force off- camera. But if you were facing a police officer with a rubber hose, would you prefer a world in which he was required to mumble the Miranda warnings and have you give some form of waiver of rights (all proved by his later testimony)? Or a world in which the interrogation is videotaped, where your physical appearance and demeanor during any "confession" are permanently recorded, with date and time electronically stamped on the tape? Videotaping is the clear winner.

While videotaping is at least as effective as Miranda in preventing police misconduct, it has the clear advantage of not inhibiting voluntary confessions. In this country, the few jurisdictions that have used videotaping have generally found no noticeable effect on confession rates. Studies here and in Britain have even suggested that police might actually obtain more incriminating information when interrogations are taped and available for later review. Congress should allow police to question suspects under such an alternative. In his Miranda opinion, Chief Justice Earl Warren said, "our decision is no way creates a constitutional straitjacket which will handicap sound efforts at reform." Since Miranda, the Supreme Court has made clear that the Miranda rules are not themselves constitutional rights, but are mere "prophylactic safeguards" -- presumably subject to congressional modification for federal cases. Congress should exercise its constitutional powers, as the final arbiter of rules of evidence in federal court, to strike a better balance between a suspect's right to be free from coercion and society's right to have voluntary confessions obtained and entered into evidence.

Miranda Warnings

You have the right to remain silent.

Anything you say may be used as evidence against you.

You have the right to speak to an attorney before being questioned and to have an attorney present during questioning.

If you cannot afford an attorney, one will be provided for you.

Do you understand these rights?

Understanding these rights, do you wish to answer my questions?

—Mr. Cassell is a professor at the University of Utah College of Law.

THE VIRTUES (AND LIMITS) OF SHARED VALUE
THE FOURTH AMENDMENT AND MIRANDA'S CONCEPT OF CUSTODY

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1993 U. Ill. L. Rev. 379

Richard A. Williamson

INTRODUCTION

A familiar principle of the law of confessions holds that once a person has been "taken into custody or otherwise deprived of his freedom of action in any significant way," the police may not interrogate that person without complying with the procedural safeguards mandated by Miranda v. Arizona. Statements obtained during the period of custodial interrogation without compliance with Miranda's mandate may not be used, whether such statements are exculpatory or inculpatory, or whether they constitute "confessions" or merely "admissions" of part or all of an offense.

In the years following Miranda, the Supreme Court decided numerous cases that attempted to clarify and refine the message of Miranda, including decisions that informed the meaning of the terms custody and interrogation. These concepts are central to the Miranda decision. If a person is not in custody when interrogated, the procedural safeguards of Miranda do not apply. Likewise, a person in custody but not interrogated receives no protection from the Miranda decision. Only when the two concepts are joined--when custodial interrogation occurs--is the Miranda decision implicated.

Two Supreme Court decisions, California v. Beheler and Berkemer v. McCarty, forged a link between the Fourth Amendment's concept of arrest and Miranda's concept of custody. In Beheler the Supreme Court stated, that a suspect is not in custody for Miranda purposes until "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Although that statement arguably was dictum, one year later in Berkemer the Court applied the Beheler standard to a person detained in a routine traffic stop. The Court held that the circumstances of a routine traffic stop are analogous to a "Terry stop" and that the individual so detained is not, without more, in custody for Miranda purposes; therefore, he or she may be questioned without first receiving the Miranda warnings.

Beheler and Berkemer specifically equated Miranda's concept of custody with the Fourth Amendment concept of arrest. Prior to Beheler and Berkemer, the relationship between the concepts was uncertain at best. Following Beheler and Berkemer, a person under arrest or detained under circumstances functionally equivalent to an arrest, is in custody for Miranda purposes. Conversely, a person who has been detained, who has suffered restrictions on freedom of movement, and who clearly has been seized for Fourth Amendment purposes, is not in custody for Miranda purposes unless formally arrested or subjected to restraints functionally equivalent to an arrest.

The Fifth Amendment protection against compelled self-incrimination, the constitutional predicate for the Miranda decision, is not, as Berkemer and Beheler implicitly recognize, the only constitutional doctrine implicated when a suspect is taken into custody and questioned. The government's action in imposing custodial restraints also constitutes a seizure within the meaning of the Fourth Amendment. Unless the government supports the seizure with information sufficient to constitute "reasonable suspicion" or "probable cause," depending on the nature of the seizure, the Fourth Amendment is violated and the seizure is unlawful. Confessions obtained during the period of unlawful detention may be inadmissible even though the confession is otherwise voluntary and obtained in full compliance with the Miranda decision.

The relationship between the concept of custody, as that term is used in Miranda, and the concepts of seizure, stop, and arrest, as those terms are defined for Fourth Amendment purposes, is more complex, however, than the above discussion reveals. During approximately the same period during which the Supreme Court promulgated and refined the Miranda doctrine, it also validated under the Fourth Amendment a police investigatory practice known as "stop and frisk." Under the stop and frisk doctrine, the police may undertake a temporary forcible detention of a person and his or her possessions upon "reasonable suspicion" that criminal activity is afoot and may "frisk" the individual if they believe him or her to be armed and dangerous. Although the objects and limits of the investigatory techniques permissible during the period of the temporary forcible detention are not defined clearly, decisions interpreting the stop and frisk doctrine, some of which occurred after the Court decided Beheler and Berkemer, have held that the police may pursue various methods of investigation, including questioning the person detained, for the purpose of either confirming or dispelling the suspicion that prompted the detention.

As Berkemer stated, none of the stop and frisk decisions held that Miranda warnings must precede investigative questioning during the period of the temporary detention.

A person is seized within the meaning of the Fourth Amendment when his or her freedom of movement is restrained. This test apparently requires examination of the circumstances surrounding a police-citizen encounter to determine whether, under the circumstances, a reasonable person would have believed he or she was not free to leave. Not every police-citizen encounter, however, constitutes a seizure within the meaning of the Fourth Amendment. If the person remains free to disregard the contact with a police officer and walk away,, the Fourth Amendment is not implicated, and the Constitution requires no particularized and objective justification. A forcible detention that exceeds what reasonably can be characterized as a "temporary" detention--that is, a detention that lasts longer than is necessary to effectuate the purposes of the seizure or one in which the investigative techniques employed are not the "least intrusive" means reasonably available to verify or dispel the officers' suspicions in a short period of time--constitutes an arrest and must be supported by probable cause. Reasonable suspicion, however, can support a temporary detention; thus, the quantum and quality of information required to support such a detention is less than traditional probable cause. All forcible detentions, however, are seizures within the meaning of the Fourth Amendment.

The intersection and potential conflict between the Miranda decision and the stop and frisk doctrine are clear. A person is in custody for Miranda purposes whenever that person has been deprived of his or her freedom of movement in any "significant way." A person is seized within the meaning of the Fourth Amendment whenever the government, by means of physical force or show of authority, restrains the person's freedom of movement. Prior to Beheler and Berkemer, the nearly unanimous view of the lower federal and state courts was that a person "under arrest" was "in custody" for Miranda purposes; thus, he or she could not be interrogated unless the procedural safeguards of Miranda were met. However, the pre-Beheler/Berkemer decisions understandably made no attempt to utilize emerging Fourth Amendment jurisprudence to resolve the Miranda custody question, apart from vague, conclusory references to suspects "under arrest."

Precisely because the Fourth Amendment jurisprudence that defines and differentiates the concepts of stop and arrest is derived from values seemingly unrelated to the values underlying the Miranda decision, presumptive equation of the concepts of "arrest" and "custody" is questionable. A person who is "under arrest" for Fourth Amendment purposes might not suffer the type of compelling environment that serves as the essential predicate for the Miranda rules. Likewise, some individuals subject to investigative detentions who merely have been stopped within the meaning of the Fourth Amendment may in fact need the protections provided by the Miranda safeguards because of the compelling circumstances of the detention. Following Beheler and Berkemer, the Court decided several cases that significantly expanded the nature and scope of permissible activity during a Terry stop, thereby indirectly affecting the protections afforded by the Miranda decision to suspects temporarily detained. Therefore, unless the Fourth Amendment values that define the concept of arrest and distinguish it from the lesser form of detention known as a stop remain sufficiently sensitive to the factors that inform Miranda's concept of custody, Beheler and Berkemer significantly distort the Fifth Amendment values advanced by the Miranda decision.

Arguably, an analysis of the Beheler and Berkemer decisions that focuses solely on the Miranda aspects of the cases is incomplete. The conclusion that the two cases significantly and unjustifiably weaken the analytical foundation of Miranda ignores the consequences of the decisions on the investigatory practice known as stop and frisk. One persuasive justification for Beheler and Berkemer might be simply that the objects of the stop and frisk doctrine would be frustrated if the police were required to administer Miranda warnings prior to questioning of suspects temporarily detained for further investigation. Moreover, full implementation of Miranda in nonarrest detentions would be impracticable because of the difficulty in quickly supplying counsel should the suspect invoke his right to counsel. Thus, perhaps the most compelling rationale for Beheler and Berkemer is that Miranda's requirements must be limited to cases involving a formal arrest or its functional equivalent because to extend the concept of custody to all detentions (i.e., seizures) for questioning would be impracticable and would significantly and unjustifiably undermine the purposes of the stop and frish technique.

This article concludes that although the relationship between the articulated values that inform the distinction between the concepts of stop and arrest and the articulated values that inform Miranda's concept of custody are not perfect, substantial fulfillment of the objectives of the Miranda decision has been achieved and the function of the stop and frisk doctrine has not been frustrated by the presumptive equation of Miranda's concept of custody with the Fourth Amendment concept of arrest. The presumption that a person detained in a Terry stop is not in custody is defensible, however, only if two conditions are met.

First, courts must interpret and apply existing precedent defining the term arrest in a manner that gives full recognition to the Fourth Amendment values that are implicated when a seizure occurs. Specifically, courts must recognize that the Fourth Amendment's command that seizures of people be

reasonable cannot be implemented fully simply by use of a clock and a yardstick. Moreover, although liberty or freedom of movement is a valued right because a right to go when and where we choose is essential to a truly free society, liberty or freedom of movement is a valued right also because it is one means by which we can lawfully avoid the government's evidence gathering techniques. Thus, in categorizing a seizure, courts also must consider both the number and intrusive character of the evidence gathering techniques employed by the police during the detention.

Second, courts must recognize and implement a subtle, yet significant, distinction between Fourth and Fifth Amendment jurisprudence grounded in the values each constitutional provision advances. Berkemer holds that the subject of an investigative detention is in custody for Miranda purposes whenever, during the period of the detention, a reasonable person would have believed that he or she was "under arrest," even though that fact was not communicated to the suspect prior to questioning. By contrast, under prevailing Fourth Amendment standards, a suspect's belief or the belief of a reasonable person in the suspect's position that he or she was "under arrest" is not controlling. Instead, the controlling issue is whether the circumstances of the detention were within the permissible range of activities authorized in a Terry stop. This subtle yet significant difference in analysis provides the basis for concluding, under appropriate circumstances, that a suspect who has merely been "stopped" for Fourth Amendment purposes nonetheless is "in custody" for Miranda purposes.

CUSTODY -- ESSENTIAL PREDICATE OF MIRANDA DECISION

In Miranda, the Supreme Court sought to provide some method to ensure that individuals subject to police interrogation were accorded their Fifth Amendment right not to be compelled to incriminate themselves. The Court specifically held that the Fifth Amendment privilege was available outside criminal court proceedings and protected people "in all settings in which their freedom of action [was] curtailed." The element of compulsion, however, was the key to the Miranda decision. The Fifth Amendment does not prohibit the police or other institutions of government from asking questions, nor does it prohibit a suspect from volunteering an incriminating statement. What the Fifth Amendment does prohibit is the use of any practice or tactic that compels a person to incriminate himself or herself. The prohibited element of compulsion is present, according to the Miranda decision, in all cases of "incustody" interrogation.

Having found compulsion inherent in the process of in-custody interrogation, Miranda held that in order to combat these pressures and to permit the full opportunity to exercise the privilege against self-incrimination, the suspect "must be adequately and effectively apprised of his rights" prior to questioning. Moreover, the Miranda decision mandated that a suspect's exercise of those rights be honored fully.

Miranda therefore proceeds from the assumption that a significant deprivation of freedom of movement--the government's exercise of the right to impose forcible restraints on an individual's freedom of action, together with police- initiated questioning--necessarily generates a form of prohibited compulsion. Cases decided both before and after Miranda have held that other prohibited forms of compulsion, physical or psychological, may occur in addition to those flowing from the fact of in-custody questioning. The fact remains, however, that following Miranda, a person in custody necessarily and always, regardless of circumstances, is considered subject to prohibited compulsion when interrogated, unless first effectively warned of his or her constitutional rights.

Although one can argue that the logic of Miranda does not require warnings for every suspect detained (i.e., seized), the same argument can be made about station house interrogation of suspects formally arrested--not all suspects formally arrested and subjected to interrogation necessarily subjectively realize the type of compulsion identified by the Miranda decision. The problem with Miranda, as with any other decision designed to provide easily administered guidelines, is one of line drawing: How far beyond the situation of station house interrogation of a suspect formally arrested can the factual predicate of Miranda--the element of presumed coercion that flows from a deprivation of freedom of movement--be sustained?

* * *

THE CONCEPTS OF STOP AND ARREST

During the past decade, the Supreme Court diligently attempted to clarify the Fourth Amendment distinction between a nonarrest detention (a Terry stop) and an arrest. Although implementation of the guidelines remains difficult, the Court has provided at least some fixed reference points. More importantly, the Court has greatly expanded the circumstances under which the stop and frisk doctrine can be invoked, thereby necessarily increasing the likelihood of Miranda issues arising during police interrogation of suspects temporarily detained.

The doctrine also has undergone transformations in other respects. Although the principal limitation on a nonarrest detention remains temporal in nature the Court has held that the "intrusiveness" of the investigative means employed during the period of the nonarrest detention is a factor that must be considered.

Florida v. Royer, decided one year before Berkemer, remains one of the Supreme Court's most significant rulings on the limits of nonarrest detentions. In Royer, the Supreme Court held that the "scope of the intrusion permitted will vary to some

extent with the particular facts and circumstances of each case." The detention, however, "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Additionally, Royer held that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."

The Royer decision was important because the Court recognized that various investigative techniques--other than frisking or questioning the suspect--could be employed during the period of a Terry stop. Although questioning of the suspect undoubtedly remains the primary investigative tool that is permissible during a Terry stop, other practices also are legitimate; for example, detention for the purpose of bringing eyewitnesses or other detection devices to the scene.

Most importantly, however, Royer implicitly established that the Fourth Amendment values implicated in nonarrest detentions include interests beyond mere deprivation of the suspect's freedom of movement. Even though a detention will become indistinguishable from an arrest at some point due to the mere passage of time, it also may become indistinguishable from an arrest simply because of the intrusive nature of the investigative means employed. Royer's detention became indistinguishable from an arrest, not because he was detained for an unreasonable period, but because he was forcibly moved to a private police interrogation room and because the object of the detention--to confirm the officers' suspicion that Royer was carrying drugs in his luggage--was not pursued in the most "expeditious way."

Royer was decided prior to Beheler and Berkemer. After Beheler and Berkemer, three cases followed in quick succession. In United States v. Sharpe, the Court confirmed Royer's assertion that no definitive time limit will be imposed on nonarrest detentions; instead, a court must examine the reasons why the officers detained the suspect and determine whether the length of time the officers used to "confirm or dispel" their suspicions was reasonable.

In Hayes v. Florida, the Court reaffirmed its earlier holdings that the forcible movement of the suspect to the station house for further investigation, such as fingerprinting, exceeds the authority conferred by Terry. The Court held that investigative practices during the period of a Terry stop can "qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments."

The most important post-Beheler/Berkemer case, however, is United States v. Hensley. In Hensley, the Court held that the permissible uses of a Terry stop include nonarrest detentions for investigation of completed crimes. More importantly, however, Hensley held that for Fourth Amendment purposes, a detention will be characterized according to the actual circumstances of the detention and without regard to the subjective intent of the police or, apparently, the subjective or reasonable perceptions of the suspect. "[W]hat matters," according to the Court, "is that the stop and detention that occurred were in fact no more intrusive than would have been permitted [in a Terry stop]."

If a nonarrest detention can be transformed into a de facto arrest simply because the investigative techniques employed exceeded those reasonably necessary given the circumstances that prompted the detention or because the police exercised authority to move the suspect, then the Fourth Amendment values implicated by a seizure must include concern for privacy interests. The character of a seizure, therefore, is a factor not just of time and space but also the ability of the government, given its ability to control the suspect's movement, to subject the suspect to intrusive evidence-gathering activities. Although the Fourth Amendment may not directly limit the ability of the government to investigate a suspect, it indirectly affects the nature and scope of investigations by limiting the government's ability to compel a person's physical presence at any particular moment and at any particular location. More importantly, the Fourth Amendment also limits the ability of the government to investigate a suspect on less than probable cause by limiting the investigative techniques that can be employed when a suspect has been detained on less than probable cause.

The stop and frisk decisions also confirm that the "intrusiveness" of the "means" by which a nonarrest detention is effectuated requires consideration of qualitative as well as quantitative factors surrounding the seizure. Assessing the reasonableness of a seizure requires balancing the extent of the intrusion against the need for it, as well as considering the manner in which it is conducted. Just as killing a fleeing felony suspect under certain conditions may constitute an unreasonable means of seizing a person, so too would the use of excessive force or other debilitating tactics--such as handcuffing--during the period of a nonarrest detention. The Fourth Amendment values inherent in the proscription against unreasonable seizures include concern for personal safety and human dignity. When the police possess probable cause to believe the suspect has committed a crime, the use of reasonable force commensurate with the objective of the seizure--indeterminate loss of freedom--is authorized, and the individual's interest in liberty or freedom of movement is subordinate and will remain so for an indefinite period. But when the police possess only reasonable suspicion that the suspect has committed a crime, the objective of the seizure-- determinate loss of freedom--is limited.

LIMITS OF SHARED VALUES

Although the values that inform the concepts of custody and arrest are closely aligned, the analogy is not perfect. Miranda's concept of custody is predicated upon the belief that significant custodial restraints produce, in the mind of the suspect, a form of prohibited compulsion. The suspect's state of mind, real or attributed, provides the factual predicate for the assumption that compulsion exists when a suspect is in custody. Miranda makes little sense if, in deciding whether a suspect is in custody, no attempt is made to view the situation as it might appear to a reasonable person.

On the other hand, when the issue is whether a suspect was subjected to a Terry-type nonarrest detention or instead was arrested, the real or attributed state of mind of the suspect is not important, given the values that inform the distinction between the two forms of seizure. When a seizure has occurred and the issue is whether the seizure is a nonarrest detention or a de facto arrest, the suspect's state of mind is irrelevant to the advancement of legitimate Fourth Amendment values. The Fourth Amendment, as a check against unlawful arrests, guarantees freedom of movement and the attendant privacy rights accompanying the right to control locomotion until such time as the government advances sufficient justification--probable cause--for limiting those freedoms. The Fourth Amendment's guarantee that we will not be arrested in the absence of probable cause, like its guarantee that our papers, houses, and effects will not be searched or seized in the absence of probable cause, operates as a check against unreasonable actions by law enforcement officials; it does not protect against psychic trauma associated with the possibility-- unrealized--that our person, papers, houses, and effects might be searched or seized. A search of our papers, houses, and effects occurs when, but only when, the police actually invade our privacy; the Fourth Amendment is not violated simply because we believe, perhaps reasonably so, that our houses, papers, and effects are about to be searched or seized, or both.

Similar reasoning applies to the law of arrests. A lawful Terry stop is not rendered unreasonable simply because the suspect believes he or she has been arrested or is uncertain as to his or her fate during the period of the temporary detention. Anxiety--a detained suspect's fear of what might happen following a lawful detention--simply is not a value recognized by the Fourth Amendment. When a suspect has been detained, the only issue is what actually happens to the suspect--the nature and quality of his or her detention. Objective factors therefore properly inform the issue of whether an arrest has occurred.

Because the concepts of custody and arrest are not aligned perfectly, one subtle yet potentially outcome-determinative difference between the two must be recognized and implemented. The determination whether a detention, because of the circumstances, crossed the threshold and became a de facto arrest for Miranda, but not for Fourth Amendment purposes, must be made with reference to the likely perception of a reasonable person. Berkemer's command that Miranda requires such an inquiry must be given full force.

Two examples will demonstrate when the divergence between Miranda's concept of custody and the Fourth Amendment's concept of arrest could be outcome determinative. In Case 1, upon reasonable suspicion a suspect is detained for a brief period in a manner that otherwise clearly would constitute a nonarrest detention for Fourth Amendment purposes, except that the detaining officer informs the suspect that he is "under arrest." Assuming that Hensley's post-hoc mode of analysis would not require a finding of a de facto arrest for Fourth Amendment purposes simply because the suspect was told he was "under arrest," the suspect nonetheless must be deemed in custody for Miranda purposes. The Miranda decision, grounded as it is in the inherently compelling environment of custodial questioning, virtually compels a finding that the suspect, clearly seized for Fourth Amendment purposes and informed that he is "under arrest," should receive the Miranda warnings. Although the mere fact that the suspect was told that he was "under arrest" does not, in itself, implicate Fourth Amendment values beyond those implicated by the very fact of the lawful nonarrest detention, the communication of the fact of arrest would have a profound effect on a reasonable person's view of the circumstances of custodial questioning that might follow. To ignore the consequences of communication of the fact of arrest in such a case would strike adversely at the very predicate for the Miranda decision.

In Case 2, a suspect is detained under circumstances that, employing Hensley's post-hoc mode of analysis, constitute a valid nonarrest detention. The suspect's vehicle is stopped upon reasonable suspicion that it contains contraband. The stop is achieved when a uniformed officer (in a police car with lights flashing) catches the suspect's speeding vehicle. The officer approaches the vehicle with his revolver drawn and orders the suspect out of the vehicle. The officer further orders the suspect to assume a "spread eagle" position. Following a Terry frisk for weapons, the officer asks the suspect for his driver's license and vehicle registration. The suspect produces his own valid license and a bill of sale for the vehicle in the name of another. In response to questions concerning ownership of the vehicle, the suspect states that it belongs to a friend. The officer informs the suspect that he will be detained until the arrival of a narcotics officer. At that point, the suspect becomes nervous, indicates that he wants to leave, and requests the return of his license. The officer tells the suspect that he is not free to leave. Fifteen minutes later, the narcotics officer arrives and informs the

suspect that he believes the vehicle contains contraband. The narcotics officer twice asks the suspect for permission to search the vehicle. Both times, the suspect declines. The narcotics officer then steps on the rear of the vehicle and, when it does not move, concludes that it is overloaded. The officer puts his nose against the trunk and states that he smells marijuana. When the suspect is asked directly whether the vehicle contains marijuana, he responds, "It's not mine. I was just carrying it for a friend." The narcotics officer opens the trunk and finds a large quantity of marijuana.

The facts of Case 2 are, in essence, the facts of United States v. Sharpe, except that in Sharpe no questioning of the suspect occurred before the marijuana was discovered. In Sharpe, the only issue presented was the legality of the detention prior to the discovery of the drugs. The Supreme Court concluded that the suspect was validly detained upon reasonable suspicion until such point as the narcotics officer detected the odor of marijuana and that the search of the vehicle was, therefore, not a "fruit" of a prior illegal detention.

Assuming arguendo that the Fourth Amendment issue presented is properly resolved in the government's favor employing the post-hoc mode of analysis, the issue remains whether the questioning of the suspect is permissible in the absence of Miranda warnings. If the issue of custody is determined as Beheler commands with reference to the likely state of mind of the suspect, this suspect surely would have felt the type of compelling environment described in Miranda. This suspect was forcibly detained by two officers. Firearms were displayed, and the suspect was frisked. He was informed that a narcotics officer had been called to the scene and that he was not free to leave. He was detained under these circumstances for fifteen minutes and, upon the arrival of a narcotics officer, was asked to consent to a search of the vehicle. Finally, he was specifically accused of driving a vehicle that the police suspected-- confirmed by the odor--contained marijuana and asked directly whether the vehicle contained marijuana. A more compelling environment outside Miranda's paradigm station house interrogation is difficult to envision.

The use of a test for custody that focuses on the perception of a reasonable suspect under the circumstances is more than a semantic exercise. It is true, of course, that the reasonable perception approach requires a court to place itself in the position of the suspect and attempt to discern how a typical person would view his or her condition. The reality, of course, is that suspects would react differently and that no single state of mind can be attributed to all suspects confronted with similar circumstances. The reasonable person approach, however, is desirable and defensible not because of its factual accuracy but because it is the approach that most closely approximates the factual and legal predicates for the Miranda decision. We evaluate Fourth Amendment stop/arrest issues utilizing a post-hoc mode of analysis because the detained suspect's perception of his status is irrelevant to the full implementation of the Fourth Amendment values implicated by his detention. The characterization of a detention is determined by what happens to the suspect, not what he or she believes might happen. What is important for Fourth Amendment purposes is what actually transpires during the period of the nonarrest detention. Is he or she forcibly subdued and restrained? Is he or she detained for a substantial period of time? Is he or she subjected to extensive and intrusive evidence gathering techniques?

When the issue is, however, whether the detained suspect needs the prophylactic safeguards mandated by Miranda, the suspect's actual or presumed state of mind is of critical importance. In fact, Miranda makes little sense unless the focus is on the suspect's actual or presumed state of mind. Thus, use of the reasonable perception standard for purposes of determining Miranda's concept of custody is defensible even though the use of that standard may produce cases where the police will be required to administer warnings to a suspect merely detained in a nonarrest situation upon reasonable suspicion of criminal activity.

CONCLUSION

The relationship between the Fourth Amendment values that inform the distinction between stops and arrests and the Fifth Amendment values that inform Miranda's concept of custody, although not symbiotic, is such that it is both intellectually defensible and logical to presume that a suspect detained in a routine nonarrest detention--a Terry stop--may be questioned without the benefit of Miranda warnings. Both constitutional concepts, to a greater or lesser extent, focus on the means used by the police to achieve their objectives, both limit the scope of the government's permissible evidence gathering techniques, and both require characterization of a forcible detention. Moreover, the wholesale injection of Miranda based logic into the investigative practice known as stop and frisk significantly would undermine the function of such detentions and well might place demands on the criminal justice system--the need for counsel--that would be impossible to fulfill.

Reconciliation of Miranda with the circumstances attendant to stop and frisk activity is difficult because the constitutional validation of the investigative technique known as stop and frisk occurred after Miranda was decided. The Miranda decision, therefore, understandably did not address the need for warnings in the context of a nonarrest detention. Accommodation of Miranda with the stop and frisk doctrine therefore was a necessary step, and Berkemer provided a workable framework for the resolution of the issue. Although Berkemer tempts courts to conclude that Miranda warnings never are required during the period of a Terry-type nonarrest detention,

such a categorical reading of Berkemer is erroneous and would produce a restrictive and indefensible limitation on Miranda that would undermine significantly both the legal and factual predicates for the Miranda decision. Berkemer's equation of the concepts of custody and arrest is presumptive only. Moreover, in defining the concept of arrest, whether for Fourth Amendment purposes or for purposes of determining Miranda's concept of custody, courts must be sensitive to the full range of Fourth Amendment values implicated when a person is seized and must not simply look to the spatial and temporal aspects of the detention. Finally, courts must recognize that the standard employed for the resolution of Miranda's custody issue in nonarrest detention cases must be made from the perspective of how a reasonable person under the circumstances would have viewed his or her position at the time of questioning.

Professor Williamson teaches law at the College of William and Mary.

94-7448 BAILEY v. U.S.

Sentencing—Mandatory sentence for using or carrying firearm during drug trafficking offense.

Ruling below (CA DC (en banc), 36 F.3d 106, 56 CrL 1060):

Test for determining whether accused "uses or carries" firearm "during and in relation to any crime of violence or drug trafficking crime" within meaning of 18 USC 924(c)(1), which imposes additional, mandatory five-year sentence on anyone using or carrying firearm during drug offense, consists of two elements: gun's proximity to drugs involved in underlying offense, and gun's accessibility to defendant from place where drugs, drug paraphernalia, or drug proceeds are located; applying this test, conviction of defendant that was based on police discovery of loaded pistol and $3,216 in cash in trunk of car that defendant was driving when he was arrested on drug charge, as well as discovery of 30 grams of cocaine in passenger compartment, is affirmed.

Question presented: Did 5–4 decision of court below misinterpret 18 USC 924(c)(1) by adopting standard that looks solely to "proximity and accessibility" of firearm to drugs or drug proceeds rather than to active employment of firearm?

Petition for certiorari filed 12/28/94, by James G. Duncan, Roy T. Englert Jr., and Mayer, Brown & Platt, all of Washington, D.C.

94-7492 ROBINSON v. U.S.

Sentencing—Mandatory sentence for using or carrying firearm during drug trafficking offense.

Ruling below (*U.S. v. Bailey*, CA DC (en banc), 36 F.3d 106, 56 CrL 1060):

Test for determining whether accused "uses or carries" firearm "during and in relation to any crime of violence or drug trafficking crime" within meaning of 18 USC 924(c)(1), which imposes additional, mandatory five-year sentence on anyone using or carrying firearm during drug offense, consists of two elements: gun's proximity to drugs involved in underlying offense, and gun's accessibility to defendant from place where drugs, drug paraphernalia, or drug proceeds are located; applying this test, conviction of defendant that was based on police discovery of pistol inside locked trunk in bedroom closet of apartment that was searched after police made several controlled drug buys there from defendant is affirmed.

Question presented: Did 5–4 decision of court below misinterpret 18 USC 924(c)(1) by adopting standard that looks solely to "proximity and accessibility" of firearm to drugs or drug proceeds rather than to active employment of firearm or to other relevant factors such as type of weapon involved, whether it was loaded, and presence of expert testimony to support government's theory of "use"?

Petition for certiorari filed 12/29/94, by David B. Smith, and English & Smith, both of Alexandria, Va.

UNITED STATES of America

v.

Roland J. BAILEY, Appellant.

UNITED STATES of America

v.

Candisha Summerita ROBINSON a/k/a Candysha Robinson, Appellant.

Nos. 90-3119, 92-3062.

United States Court of Appeals,

District of Columbia Circuit.

36 F.3d 106

Argued In Banc March 30, 1994.

Decided Oct. 4, 1994.

GINSBURG, Circuit Judge:

This consolidated case involves two separate challenges, one by appellant Roland Bailey and one by appellant Candisha Robinson, to their convictions under 18 U.S.C. §924(c)(1). In relevant part, that section imposes a five-year term of imprisonment upon anyone who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." We have long required that in order to support a conviction under §924(c)(1), the government must demonstrate both a "nexus . . . between a particular drug offender and the firearm," and that "the gun facilitate[d] the predicate offense in some way." In order to assess whether the government has made the required showing, we have developed an open-ended test that takes account of numerous factors arguably relevant to whether a gun was used in relation to a drug trafficking offense. Applying this test, divided panels of the court affirmed Bailey's conviction, and reversed Robinson's conviction.

Because this complex, open-ended test has produced widely divergent results and because we believe that it intrudes the court into the province of the jury, we now replace it with a test that looks to two factors only: the proximity of the gun to the drugs involved in the underlying offense, and the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located. Applying that test, we affirm both convictions.

I. BACKGROUND

* * *

Each defendant appealed his or her §924(c)(1) conviction on the ground that the Government had failed to adduce sufficient evidence at trial that he or she had "used" or "carried" a firearm in relation to a drug offense. Different panels affirmed Bailey's conviction and reversed Robinson's, in each case over a dissent. Bailey and the government respectively suggested rehearing in banc. In order to resolve the apparent inconsistencies in our various decisions applying §924(c), we consolidated the two cases and reheard them in banc.

II. ANALYSIS

Section 924(c)(1) states that:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

By requiring that the use of the firearm be "in relation to" a drug trafficking offense, the Congress made it clear that it did not intend to criminalize the mere possession of a firearm by someone who commits a drug offense. "[T]he firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." At the same time, it is clear that a firearm need not actually be brandished in order to be used or carried in connection with a drug trafficking offense. . . .

A. Section 924(c)(1) to Date

In an effort to distinguish between mere possession of and the use or carrying of a gun in connection with a drug trafficking crime, we held early on that more than just evidence of proximity was required to establish "that the gun supported the possession crime." By the next year, we were able to state that "a number of factors" may be relevant in any particular case: "courts have identified and will [continue to] identify" such factors. Just two years later Judge Wald summarized the development of our case law this way:

> [W]e have enumerated a nonexclusive set of factors to weigh in making that [distinction]. Among other things, we look to whether a gun is accessible to the defendant, whether it is located in proximity to the drugs (which may cut either way depending on the facts of a particular case), whether it is loaded, what type of weapon it is, and, finally, whether there is expert testimony to bolster the government's particular theory of "use." . . .

Defendants Bailey and Robinson do not attack this open-ended (for convenience Bruce-Morris-Derr) approach in determining whether a gun was used during and in relation to a drug trafficking offense.

* * *

Preliminarily, therefore, we survey the problems inherent in the Bruce-Morris-Derr approach: intrusion into the province of the factfinder, seemingly inconsistent results, and a continuing conflict with the interpretation of §924(c)(1) adopted by virtually every other circuit.

1. The Province of the Jury

* * *

Whether a gun was used during and in relation to a drug trafficking offense is, at its core, a question of fact. In a case where the gun was not actually fired or brandished during the commission of the crime, it may well be an ultimate rather than a basic fact, but it is still a question of fact and not of law. Of course, an appellate court may properly determine, as a matter of law, the baseline or minimum conduct that can constitute a "use," and it must determine in each case, with appropriate deference to the jury, whether the record contains sufficient evidence of such conduct. The reviewing court does not sit, however, to make its own finding with respect to an ultimate fact. Weighing the evidence is a function assigned to the jury: "We are not a second jury weighing the evidence anew and deciding whether or not we would vote to convict the defendant." Yet the use of an approach that requires the court to weigh numerous factors and to determine the specific relevance of individual facts in order to assess the sufficiency of the evidence invites the court to do just that.

The Bruce-Morris-Derr approach strips from the jury its "responsibility [as] the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." For example, in United States v. Bruce, we were at considerable pains to determine whether a small gun found in the pocket of a coat along with a stash of drugs "was intended for use only at the time of distribution" or was rather "the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." Determining that the former was more likely true, we reversed the conviction. Similarly, in Derr and Robinson, the panel struggled to determine for itself the significance of the fact that the defendant's gun was locked respectively in a closet or trunk with a stash of drugs at the time of the defendant's arrest. Determining the weight to be given a single piece of evidence is not ordinarily an appropriate function for an appellate court.

A due regard for the limits that the jury system necessarily places upon the scope of our review would not lead us to abdicate all our responsibility as an appellate court--for example by affirming any conviction in which a gun is found and there is some connection, no matter how speculative or remote, between the gun and the predicate drug offense. A jury may convict a defendant for any of a number of impermissible reasons, and therefore, if the defendant claims that the evidence against him is insufficient to sustain his conviction, we must as an appellate court review the record conscientiously. Nor does our recognition that the approach heretofore used in this circuit impinges upon the province of the jury by itself predetermine precisely how we ought to review a §924(c)(1) case. It does, however, strongly suggest that we must replace the open-ended Bruce-Morris-Derr approach with a manageable standard; we must, that is, state clearly the minimum showing that the government must make in order to put to the jury the question whether a defendant has violated §924(c)(1).

2. Inconsistent Results

The open-ended approach described in Derr has produced widely divergent and seemingly contradictory results. . . . Although each of these cases can be distinguished on the basis of one or another fact--for example, by looking to the type of gun involved or to how easily the defendant could have grabbed the gun at the time that he was arrested--such distinctions seem counter-intuitive if not arbitrary. Having reflected upon our experience, we think it apparent that the court has failed to take a consistent approach because it has not laid down a standard that yields determinate results in any but the easiest of cases.

3. Conflict with Other Circuits

No other circuit has found our open-ended approach persuasive. Our sister circuits have each adopted a definition of "use" that is considerably broader than firing, displaying, or otherwise brandishing the firearm. They focus upon whether the evidence concerning the location of the gun is sufficient to permit the jury to conclude that the gun in some way facilitated the predicate drug trafficking offense. From a functional perspective, the standards they have developed for assessing the sufficiency of the evidence are much more similar to the "proximity and accessibility" standard we adopt today than to the open-ended approach that we have used in the past.

* * *

Every other circuit similarly focuses, in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense. . . .

B. Section 924(c) Henceforth

As the Supreme Court has made clear, the government must make two distinct showings in order to obtain a conviction under §924(c)(1): "that the defendant 'use[d] or carrie[d] firearm' " and "that the use or carrying was 'during and in relation to' " a predicate offense. Therefore, in determining what the proper standard should be, we must determine both what constitutes the use or carrying of a gun and in what circumstances such a use or carrying is in relation to a drug trafficking offense.

1. "Use" of a Firearm

In the context of §924(c)(1), "use" could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking. The narrow definition has the virtue of simplicity; it is, after all, relatively easy to determine whether the defendant's firing, brandishing, or displaying a gun was related to the defendant's contemporaneous (recall the "during" requirement of §924(c)(1)) drug trafficking offense. The narrow definition also has the vice of simplicity, however; it is too narrow to capture all of the various uses of a firearm that the Congress apparently intended to reach via §924(c)(1).

* * *

Like firing, brandishing, or displaying a gun, barter involves handling the gun. A gun can surely be used even when it is not being handled, however. For example, a gun placed in a drawer beside one's bed for fear of an intruder would, in common parlance, be a gun "used" for domestic protection.

This more inclusive understanding of "use" has long been recognized in the jurisprudence of the Supreme Court. In Astor v. Merritt, the Court was required to interpret a customs statute that exempted from duty "[w]earing apparel in actual use . . . of persons arriving in the United States." The petitioner sought an exemption for clothing that he and his family had purchased abroad, but not yet worn. The Court accepted his argument: If a person residing in the United States should purchase wearing apparel here, in a condition ready for immediate wear without further manufacture, intended for his own use or wear, suitable for the immediately approaching season of the year, and not exceeding in quantity, quality or value the limit above mentioned, no one would hesitate to say that such wearing apparel was 'in actual use' by such person, even though some of it might not have been actually put on or applied to its proper personal use. . . . An article of wearing apparel, bought for use, and appropriated and set apart to be used, by being placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards. Likewise, in Smith, the Court noted with approval the following definition of the verb "to use": " '[t]o make use of; to convert to one's service; to avail oneself of; to utilize; to carry out a purpose or action by means of.' "

In the context of §924(c)(1), therefore, we hold that one uses a gun, i.e., avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime. In a case where the predicate offense involves the distribution of drugs, the government must show that the defendant had the gun in such a place at the time that the drugs were being distributed. In a case when the predicate offense is possession with the intent to distribute drugs, however, the government need not prove that the gun was in that place during the entire period that the defendant illegally possessed the drugs or that it was in that place at the time that the defendant was arrested. Because possession with the intent to distribute is a continuing offense--that is, an offense that extends through time--the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs.

2. "During" and "In Relation To"

Once it is determined that the defendant has used or carried a gun, the more difficult question is whether he has done so "in relation to a drug trafficking offense." As the Court noted in Smith, this requirement "at a minimum, means that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." For the statute to be violated, therefore, the gun "must 'facilitat[e] or ha [ve] the potential of facilitating' the drug trafficking offense." Using a gun to protect one's drugs, drug paraphernalia, or the proceeds of one's drug sales is therefore clearly a prohibited use of the gun. Our prior decisions under §924(c)(1) recognize as much.

* * *

In sum, it is apparent that positioning a firearm in such a way that it protects or is otherwise integrated into one's drug trafficking is not just a use of that gun, but is a use of that gun in relation to a drug trafficking offense and is therefore covered by the statute. What, then, is sufficient evidence that a gun found at the scene of a drug crime is being used in this way?

Whenever there is sufficient evidence for a jury to find that the defendant at some time during the commission of the predicate drug offense put or kept

a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (e.g., a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions), the jury may also infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of §924(c)(1). We emphasize that the jury may draw this inference regardless whether the predicate offense is one of drug distribution or of possession with intent to distribute drugs; we reject any suggestions to the contrary in our prior opinions. As the Eighth Circuit has stated: It has become common knowledge that drug traffickers typically keep firearms available to protect themselves and their drugs and drug money. The presence and the availability of the firearms are often crucial to the "success" of the drug enterprise. It is therefore permissible for juries to infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)(1).

* * *

This test for use is not only an accurate means of ensuring that the scope of §924(c)(1) is as broad as the Congress intended it to be; it will also avoid the problems with the Bruce-Morris-Derr approach that we outlined above. First, as we have already noted, placing or keeping a gun in such a way that it protects a drug trafficking operation is clearly a "use" of a gun "in relation to a drug trafficking offense." In most cases, the gun's proximity to and accessibility from the actual site of the defendant's drug trafficking will be the most probative evidence that the defendant was using the firearm to protect his drug trafficking. Similarly, whether the defendant carried the gun with, or to or from the location of, the drugs will be the most probative evidence that he carried it during and in relation to a drug trafficking offense. Second, this test can be readily administered both by the district court, which must determine whether the Government's case may go to the jury, and by the appellate panel that must determine whether the evidence was sufficient to support a conviction under §924(c)(1). As such, it will assure greater uniformity across cases while penalizing more precisely the conduct that the Congress intended to reach.

C. Application of the Standard

Applying the standard for "use" to the present cases, we hold that the Government presented sufficient evidence to convict both Bailey and Robinson. When Bailey was arrested, there were 30 grams of cocaine, more than $3,200 in cash, and a loaded 9-mm. pistol in his car. He was properly convicted of possession with the intent to distribute the cocaine. Because the gun was found in the same place as the cash (namely, the trunk) and in the same car as the drugs that formed the basis of his drug trafficking conviction, the jury was entitled to infer that the money was the proceeds of an ongoing drug operation. The requirements of proximity and accessibility were both satisfied. The gun was proximate to the drugs and was easily accessible to Bailey at any time that he was handling either the drugs or the proceeds of their sale. The jury could reasonably infer that Bailey had intentionally incorporated the gun into his drug operation, was using it as part of that operation, and was therefore using it in relation to his possession with intent to distribute the drugs. Although the record does not demonstrate that Bailey had made a specific drug sale (the amount of money he had notwithstanding), there is little reason to doubt that he was using the gun in relation to the possessory offense regardless whether the gun actually furthered the possessory offense or emboldened him to commit that offense. It is enough that the jury was entitled to conclude that Bailey had put the gun into the car not for some unrelated purpose but because he was keeping drugs there; that alone establishes that the gun was used in relation to Bailey's drug trafficking offense. We therefore affirm his conviction.

The same analysis requires that we affirm Robinson's conviction. In her case, the firearm was found in the same locked trunk as were the drugs that formed the basis of her conviction for possession with intent to distribute. Again, the requirements of proximity and accessibility are obviously satisfied: The gun was proximate to the drugs, and it was accessible to anyone, such as Robinson, who had access to the drugs. Because the jury found beyond a reasonable doubt that the drugs were Robinson's--a finding not at issue here--it could also infer from these facts that Robinson placed or kept the gun in the same location as the drugs in order to protect her possession of the drugs. Hence, the jury was entitled to conclude that Robinson used the gun in relation to the drug trafficking offense.

III. CONCLUSION

In sum, we reject the open-ended Bruce-Morris-Derr approach and conclude instead that in order to survive a challenge to the sufficiency of the evidence for a conviction under §924(c)(1), the Government need only point to evidence that the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense. When there is evidence of proximity and accessibility, we will affirm a conviction under §924(c)(1). Because the government presented such evidence at the trials of both Bailey and Robinson, the judgments of conviction in each case are

Affirmed.

WALD, Circuit Judge, dissenting:

There are four reasons why I believe the majority's bright line test for determining whether a gun has been "used" to commit a drug offense is wrong. First: Although I agree that "use" under 18 U.S.C. §924(c)(1) requires the government to show that the gun in some way "facilitated" the defendant's commission of the underlying drug offense, the sticking point is what kind of evidence it takes to make that showing. The Bruce-Morris-Derr line of cases did not in that sense set forth any test or formula for making such a determination; rather, it provided only a list of potentially relevant factors, i.e., the type of weapon involved, whether it was loaded, the presence of expert testimony to support the government's theory of "use," the proximity of the gun to the drugs, and the accessibility of the gun to the defendant. By focusing on only two of the factors--(1) proximity of guns to drugs, drug paraphernalia, or drug proceeds and (2) accessibility of the guns to the defendant from a place used to store drugs, drug paraphernalia, or drug proceeds--to the exclusion of any other relevant factors, the majority in my view diminishes rather than enhances the prospect of accurate assessment on a case-by-case basis as to whether the gun was used to facilitate the drug offense. Congress, it should be noted, created no statutory presumption that "use" automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so.

* * *

Third: The new test is not only unduly rigid, it is not even clear. I cannot fathom how the accessibility prong, as defined by the majority, will work, or what indeed it adds to the minimal proximity test. It seems that whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant from the place the drugs are being stored. Thus if the guns and drugs are found together in a locked strongbox and the defendant is miles away, under the majority's test, the guns are arguably accessible to the defendant from the place where the drugs are stored and are being "used" to facilitate the possession of the drugs. To state the proposition is to reveal its illogic. Under the statute it is the defendant who must use the gun, so it is the accessibility of the gun to him at the time of the drug offense charged that is relevant, not the accessibility of the gun to a phantom defendant who is positioned where the drugs are. This latter definition of accessibility makes no sense whatsoever. Indeed, the majority's peculiar definition of accessibility renders their "use" test much looser than that endorsed by several other circuits, which at least focus on whether the guns were proximate to the defendant as opposed to merely accessible from the place where the drugs, drug paraphernalia, or drug proceeds are stored.

* * *

Finally, while I find Judge Williams' narrower interpretation of "use" quite persuasive, I cannot go so far as to agree that an actor who has intentionally placed a gun within easy access of his person in order to guard or to distribute drugs is not using the gun to facilitate the drug offense unless he openly brandishes, displays, or makes verbal threats about the gun. Where evidence of ready access to a gun by the defendant guarding or distributing the drugs exists, I think the jury can fairly draw the inference that such access is an intrinsic part of the criminal drug trafficking act. But conversely, I do not, like the majority, think it a fair inference that where the defendant has no such ready access to the gun, but instead is shown merely to be in constructive possession of the drugs which are located near the gun but away from the defendant, he is nonetheless using the gun to facilitate his possession or distribution. That I believe to be the principal difference between the other dissenters and myself, since I agree with them that "use" involves activity of some sort by a defendant who is in the immediate vicinity of the weapon, and not mere placement of the weapon near the drugs. That difference, however, is of sufficient import so as not to allow me to subscribe to Judge Williams' bright line rule any more than the majority's. Bright lines have a place in our jurisprudence but primarily with respect to what third parties like policemen or citizens can do without running afoul of the law. They are distinctly less useful in telling juries or judges what kind of evidence will suffice to show that a defendant is guilty of a generic crime that can be committed against a thousand different factual backdrops.

Because I believe that there was sufficient evidence to support Bailey's conviction for use in relation to actual possession of drugs with intent to distribute, i.e., the gun in the trunk of the car was readily accessible to protect the drugs in the passenger compartment, but not Robinson's, i.e., there was proof only of drugs and an unloaded gun in a locked trunk in a bedroom closet, I would affirm the first conviction and reverse the second. I would not adopt the majority's proximity and accessibility test but would instead continue to allow juries and judges to rely on all relevant factors to decide each case.

STEPHEN F. WILLIAMS, Circuit Judge, with whom SILBERMAN and BUCKLEY, Circuit Judges, join, dissenting:

Nearly all of our sister circuits say that mere possession of a firearm does not constitute "use" under 18 U.S.C. §924(c). In the same breath, however, all--joined today by this court--allow conviction without evidence of the defendant's firing, brandishing, displaying or actively using the firearm in any way. In joining the other circuits, the court undoubtedly simplifies our previous vague multifactored balancing test for review of §924(c)

cases for sufficiency of the evidence. And the majority is surely right that it is perfectly appropriate to overturn statutory interpretations where, as here, the precedent rejected is "fundamentally flawed", and of course especially where, again as here, the precedent acts as "a positive detriment to coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision". In recent years, our cases have produced such inconsistency largely because we have failed to identify a clear definition of the term "use" of a firearm; it is that failure that has led to our frequent second-guessing of juries. In attempting to mend the incoherence of our previous approach by articulating a "proximity" plus "accessibility" test, however, the court has in effect diluted "use" to mean simply possession with a floating intent to use. In all but the rarest case, then, a defendant will be subject to punishment under §924(c) if guilty of a drug trafficking offense and, while committing the offense, was in possession of a firearm. I think the wording, history and context of §924(c) call for a different bright-line rule–one requiring active "use" rather than possession with a contingent intent to use.

* * *

The majority asserts that a gun placed in one's drawer with an intent to use it in the event of an intruder is, "in common parlance, [ ] a gun 'used' for domestic protection". This is possible in some contexts, but they are contexts in which the fact of "use" is assumed. Q: "What do you use the gun for?" A: "I use it to protect my family." In that hypothetical the answerer accepts the questioner's premise that the gun is in some sense used. But as the question assumes something that is not established, the answerer might well go back to the premise: A: "Actually, I've never had to use it. I keep it here in case of an intruder."

* * *

While the majority attempts to fine-tune the concept of facilitation (and thereby, use) through its twin guideposts of proximity and accessibility, the ultimate result is that possession amounts to "use" because possession enhances the defendant's confidence. Had Congress intended that, all it need have mentioned is possession. In this regard, the majority's test is either so broad as to assure automatic affirmance of any jury conviction or, if not so broad, is unlikely to produce a clear guideline. Thus, if the new standard proves anything less than a carte blanche for conviction, it will lead to the same sort of continuous and vacillating review of jury verdicts that our past jurisprudence has yielded and that the court so rightly deplores.

Under my view of "use" there can be no serious argument that either Robinson or Bailey "used" the weapons as to which they were charged under §924(c). But Bailey plainly transported his firearm in the trunk of his car, and the jury in his case was instructed to find whether the defendant had "used or carried" the weapon. Thus the question arises whether transportation of a firearm under these circumstances can sustain a conviction for carrying a firearm.

* * *

I do not believe §924(c) can properly be extended from these situations to that of the defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have §924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, that seems an improbable duplication. Rather, consonant with an active notion of "use", with the Senate Report's example of a weapon carried in the defendant's pocket, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying the gun during and in relation to his possession with intent to distribute drugs.

That is not to say that a defendant arrested with a gun in his trunk may never be convicted under §924(c). Realistically, drug dealers often operate out of car trunks, returning from a distribution station to replenish drugs, deposit cash or retrieve a weapon. If the government presents evidence that the defendant handled the weapon by placing it in the car "during and in relation to" action taken in the commission of a predicate offense, that evidence would be sufficient to sustain a conviction. Alternatively, there may be cases where the government can prove that the defendant bought the firearm such a short time before arrest on the drug trafficking offense as to sustain an inference (beyond a reasonable doubt) that he must have been handling it simultaneously with commission of the drug offense. But as a gun can obviously rest in a trunk for a long period, the mere fact of a gun's presence there, coupled with the defendant's use of the car for drug distribution, does not give rise to an inference of the necessary simultaneity of immediate access to the weapon (in a context of moving it about) and commission of the predicate crime. As there appears to be no evidence in the record against Bailey beyond his drug trafficking and the location of the weapon in the trunk, his conviction cannot be sustained on such a ground.

The majority's expansive view of "use" virtually emasculates the role of the term "carry" in the statute. If "use" is understood to require real activity (such as brandishing, displaying or threatening), and "carry" to require conveying the firearm, coupled with immediate ability to put it to active use, both terms will have a

meaningful yet distinct content, consistent with the language, context and legislative history of §924(c).

I would reverse the convictions of both Bailey and Robinson.

SILBERMAN, Circuit Judge, dissenting. [Omitted.]

94-1861 MUSQUIZ v. U.S.

Right to silence—Admissibility of defendant's post-arrest, pre-warnings silence.

Ruling below (CA 5, 45 F.3d 927, 56 CrL 1485):

Circuit precedent downplaying probative value of accused's silence during period after arrest but prior to receiving warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966), is undermined by subsequent opinions of U.S. Supreme Court, including *Brecht v. Abrahamson*, 61 LW 4335 (1993), and *Fletcher v. Weir*, 455 U.S. 603 (1982), which indicate that silence during this period can be highly probative; probative value of evidence of defendant's failure, after his arrest but before Miranda warnings, to come forward with his exculpatory explanation for his attempt to gain entry to car loaded with cocaine outweighed its potential for unfair prejudice, and its admission at defendant's trial did not violate Fed.R.Ev. 403.

Question presented: When proof of defendant's silence after arrest is offered against him, does it make any difference whether silence came before or after Miranda warnings for purposes of constitutional protection, exercise of court's supervisory power, or balancing test prescribed by Rule 403?

Petition for certiorari filed 5/12/95, by Michael Ramsey, of Houston, Texas.

UNITED STATES of America, Plaintiff-Appellee,

v.

Gilbert Martinez MUSQUIZ and Robert Martinez Gatewood

Defendants-Appellants.

No. 93-2600.

United States Court of Appeals,

Fifth Circuit.

45 F.3d 927

Feb. 10, 1995

PATRICK E. HIGGINBOTHAM, Circuit Judge

Robert Martinez Gatewood and Gilbert Martinez Musquiz appeal their criminal convictions on cocaine charges, urging that their conduct was misread--they were not dealing but trying to collect DEA reward money by turning in drug dealers. The main issue now is whether the trial court should have allowed the prosecutor to cross-examine Musquiz about why he failed to offer this explanation and instead remained silent after he was arrested and before receiving Miranda warnings. We hold that the questions were permissible, reject other contentions, and affirm.

* * *

II.

Defense counsel by a motion in limine asked the court to instruct the prosecutor not to question Musquiz about his silence in the interval between arrest and Miranda warnings. The trial judge denied the motion. Musquiz testified on direct examination that he was just trying to earn a reward for turning in drug traffickers. The prosecutor cross-examined Musquiz about his not offering this explanation when he was arrested.

Musquiz relies on United States v. Henderson. Henderson turned on the balance to be struck between probative value and prejudice under the rules of evidence. Henderson, a prisoner, was silent when searched for marijuana. Miranda warnings came after the search. After Miranda warnings, Henderson gave his explanation, the same explanation he offered at trial. The court held it was reversible error to attack Henderson's explanation by stressing in closing argument his silence when confronted by officials. The panel concluded that the comment was highly prejudicial and lacked significant probative value, since Henderson's silence was consistent with his explanation at trial. Concluding that on these facts the prejudice outweighed the minimal probative value, the panel reversed Henderson's conviction. Henderson and Impson, on which it relied, reflect hostility toward prosecutorial use of a defendant's silence. That hostility seems to have flourished against the backdrop of an expansive vision of a defendant's rights under the Fifth Amendment, although the opinions do not offer that explanation. Whatever the source, it found expression both in their balancing of prejudice and probative value and in the absence of deference given the trial court's ruling. Laying aside the correctness of the appellate role they implicitly assume, these decisions yield no ruling or holding binding on later panels of this court. Rather, they are case specific and fact bound. We would be consistent with Henderson and Impson in our holding today even if the legal matrix in which the balance is to be struck had not changed. It has.

The Supreme Court and other courts of appeals do not, at least now, share the Henderson panel's unwillingness to give much, if any, weight to the probative value of a defendant's silence. Indeed, Henderson and Impson refused to recognize the difference between silence before a Miranda warning and silence after a defendant has been told that he may remain silent and his silence will not be used against him. This worked an extension of Miranda 's bite by giving silence little, if any, probative value and blurring the distinction between silence before and silence after a Miranda warning.

Since Henderson, the Supreme Court, using the same framework of probative value and prejudice, has recognized that "[s]uch [post-arrest, pre- Miranda] silence is probative." It has distinguished post-warning silence, holding that a Miranda warning that a suspect need not make a statement makes the use of silence both unfair and unreliable because the warnings "induce[ ] silence by implicitly assuring the defendant that his silence [will] not be used against him." Indeed, the Court has found that pre- Miranda silence can be highly probative precisely because it implicates no such assurances.

We cannot agree then with Musquiz's contention that Henderson laid down a prophylactic ban on admission of post-arrest, pre-Miranda silence or that its holding rested on federal supervisory power. The reality is that Henderson 's weighing came at the high mark of Miranda's reach, a reach later shortened by the developing Miranda doctrine.

On these facts, a reasonable juror may have supposed that Musquiz would have explained when confronted by the police if he was in fact trying to assist the police in catching drug dealers. The district court acted well within its discretion in allowing the cross-examination. Given the deference due the trial

court ruling, we cannot conclude that the probative value of Musquiz's silence was substantially outweighed by the danger of unfair prejudice. We find no error in the admission of this evidence. In doing so we announce no broad rule of evidence. The admission of evidence that a defendant remained silent on arrest and before a Miranda warning turns on fact specific weighing by the trial judge.

* * *

AFFIRMED.

94-1993 HALL v. U.S.

Search and seizure—Commercial curtilage.

Ruling below (CA 11, 47 F.3d 1091, 57 CrL 1063):

Assuming that "commercial curtilage" is meaningful Fourth Amendment concept, occupant of business property must take affirmative steps to bar public from area to render that area private; fact that public is not invited into area is not relevant to determination of whether area is within commercial curtilage; facts that company shredded documents, placed them in garbage bag, and placed bag in closed dumpster on business property demonstrated only that company had subjective expectation of privacy in documents; company had no reasonable expectation of privacy in shredded documents that was violated when police officer drove up unmarked private business driveway and removed documents from dumpster in parking area; company chairman's conviction of illegally selling restricted military parts to Iran on basis of evidence contained in shredded documents is affirmed.

Question presented: Has Eleventh Circuit erroneously decided important question of federal constitutional law regarding applicability of "commercial curtilage" concept that has not been, but should be, settled by this court?

Petition for certiorari filed 6/6/95, by Joel Hirschhorn, of Coral Gables, Fla.

UNITED STATES of America, Plaintiff-Appellee,

v.

Terrence HALL, Defendant-Appellant.

No. 93-4456.

United States Court of Appeals,

Eleventh Circuit.

47 F.3d 1091

March 16, 1995.

HATCHETT, Circuit Judge:

In February, 1993, a jury convicted Terrence Hall, chairman of Bet-Air, Inc., a closely held Miami-based seller of spare aviation parts and supplies of fourteen counts of violating various federal laws in connection with Bet-Air's sale of restricted military equipment parts to Iran. After conviction, the district court sentenced Hall to a prison term of fifty-one months. We affirm.

* * *

PROCEDURAL HISTORY

In August, 1990, a federal grand jury in the Southern District of Florida returned a fourteen count indictment against Hall and several codefendants. In April, 1991, Hall moved to suppress all evidence derived from the warrantless search of the garbage dumpster and all evidence seized during the search pursuant to a warrant of the Bet-Air premises. The magistrate judge found that Bet-Air had a "substantially reduced expectation of privacy in the roadway and surrounding area, including the garbage dumpster" and, therefore, recommended that the motion to suppress be denied. The district court adopted the magistrate judge's report and recommendation. Following a jury trial, Hall was convicted as charged on all counts of the indictment and sentenced to a term of fifty-one months imprisonment as to each of the fourteen counts, the sentences to run concurrently with each other. Hall appeals.

ISSUES

In this appeal, Hall raises the following claims: (1) the district court erred in denying his motion to suppress documents and records seized pursuant to the execution of a search warrant where the probable cause for the warrant was obtained through a warrantless search of a dumpster located in Bet- Air's "curtilage"; (2) the prosecutor's closing remarks were improper and prejudicial; and, (3) the district court improperly exercised its sentencing discretion in applying the Sentencing Guidelines to a pre-Guidelines case.

CONTENTIONS

Hall contends that Bet-Air had a reasonable expectation of privacy in the shredded documents. He argues that Bet-Air took at least four affirmative measures to safeguard its privacy interest in the documents: the documents were shredded; the documents were sealed inside a green garbage bag; the green garbage bag was placed inside an enclosed garbage dumpster; and the garbage dumpster was within the "commercial curtilage" adjacent to Bet-Air offices forty yards from public property. Hall also argues that Parks's entry onto Bet-Air's premises constituted unauthorized entry onto private property.

The government contends that Bet-Air's subjective expectation of privacy in its garbage was not objectively reasonable because the company did not take steps to limit the public's access to the dumpster. Additionally, the government contends that at the time of the entry, Agent Parks believed the road leading to Bet-Air's premises to be a public road.

DISCUSSION

A. Suppression Motion

* * *

In California v. Greenwood, the Supreme Court held that a warrantless search and seizure of garbage left in a plastic bag on the curb in front of, but outside the curtilage of, a private house did not violate the Fourth Amendment. The Court, relying on Katz v. United States, held that such a search would only violate the Fourth Amendment if the persons discarding the garbage manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable.

* * *

As support for his assertion that Bet-Air's expectation of privacy in its discarded garbage was objectively reasonable, Hall points to the fact that Parks obtained documents that were shredded, then placed inside a green garbage bag, which was in turn placed inside a garbage dumpster. We believe that the manner in which Bet-Air disposed of its garbage

serves only to demonstrate that Bet-Air manifested a subjective expectation of privacy in its discarded garbage. Whether Park's actions were proscribed by the Fourth Amendment, however, turns on whether society is prepared to accept Bet-Air's subjective expectation of privacy as objectively reasonable.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." It is well established that the Fourth Amendment protections apply to commercial premises. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." The Fourth Amendment, moreover, "protects people, not places." Thus, whether the Fourth Amendment's protections are invoked to protect the sanctity of the home or of commercial property, the touchstone of the inquiry into the objective reasonableness of an expectation of privacy is whether the governmental intrusion infringes upon the personal and societal values the Fourth Amendment protects.

The fact that the test of the legitimacy of an expectation of privacy is the same in both the residential and commercial sphere does not mean, however, that the factors which tend to be of probative value in resolving the inquiry when the governmental intrusion involves a residence, are to be accorded the same weight when the inquiry is directed at the legitimacy of a privacy expectation in commercial property. The Supreme Court's treatment of the expectation of privacy that the owner of commercial property enjoys in such property has differed significantly from the protection accorded an individual's home. Such distinctions are inevitable given the fundamental difference in the nature and uses of a residence as opposed to commercial property. These distinctions are drawn into sharp focus when, as in this case, the government intrudes into the area immediately surrounding the structure. In order for persons to preserve Fourth Amendment protection in the area immediately surrounding the residence, they must not conduct an activity or leave an object in the plain view of those outside the area. The occupant of a commercial building, in contrast, must take the additional precaution of affirmatively barring the public from the area. The Supreme Court has consistently held that the government is required to obtain a search warrant only when it wishes to search those areas of commercial property from which the public has been excluded.

Whether Bet-Air's subjective expectation of privacy was objectively reasonable, that is, whether Park's actions infringed on any societal values the Fourth Amendment protected, requires, we believe, an inquiry into the nature of the privacy interest asserted and the extent of governmental intrusion. The Supreme Court's teachings in Greenwood will guide our inquiry.

Relying on the fact that the dumpster was within the "commercial curtilage" of Bet-Air's property and that it could only be accessed by traveling forty yards on a private road, Hall asserts that the company's subjective expectation of privacy was objectively reasonable. Hall's argument has two parts: Parks's trespass onto private property and the dumpster's proximity to Bet-Air's offices.

The dumpster's location on Bet-Air's private property does not contribute significantly to a finding that the company's expectation of privacy was objectively reasonable. Hall's heavy emphasis on Parks's trespass onto Bet-Air's private property is misplaced. The law of trespass forbids intrusions onto land that the Fourth Amendment would not proscribe. We note that although the road leading to Bet-Air's dumpster was private, the magistrate judge found that no "objective signs of restricted access such as signs, barricades, and the like" were present. Moreover, the magistrate judge also found that at the time Parks travelled the road, he believed it was a public road. Hall has not come forth with any evidence disputing Parks' assertion. We also note that the Supreme Court has long since uncoupled the application of the Fourth Amendment's protections from the common law doctrine of trespass. The Fourth Amendment's reach does not turn upon the mere presence or absence of physical intrusion into an enclosure. "The existence of a property right is but one element in determining whether expectations of privacy are legitimate."

As we noted earlier, the owner of commercial property has a reasonable expectation of privacy in those areas immediately surrounding the property only if affirmative steps have been taken to exclude the public. Greenwood, moreover, demonstrates that one indicator of the objective reasonableness of an expectation of privacy in discarded garbage is the degree to which persons expose their garbage to the public. We do not read Greenwood as measuring the degree of exposure only through reference to that which is in plain view. In Greenwood, the Supreme Court considered the extent to which the public had been afforded access to the discarded trash. Admittedly, the Court, in Greenwood, was not faced with an intrusion onto private property. As we have already demonstrated, however, the probative value of the fact that the dumpster was located in the area immediately surrounding Bet- Air's property is substantially attenuated due to the lack of any evidence that Bet-Air took steps to exclude the public. Hall argues that the government has not demonstrated that the general public was invited onto Bet-Air's private property. We do not believe this is the appropriate inquiry when an expectation of privacy is asserted in the area immediately surrounding a commercial building. Rather, the Supreme Court has consistently stated that a commercial proprietor has a reasonable expectation of privacy only in those areas where affirmative steps have been taken to exclude the

public. This failure to exclude the public takes on increased significance when the asserted expectation of privacy is in discarded garbage. The common knowledge that garbage left on the side of a public street is "readily accessible to animals, children, scavengers, snoops and other members of the public" renders an expectation of Fourth Amendment protection unjustified. A commercial proprietor incurs a similarly diminished expectation of privacy when garbage is placed in a dumpster which is located in a parking lot that the business shares with other businesses, and no steps are taken to limit the public's access to the dumpster. It is common knowledge that commercial dumpsters have long been a source of fruitful exploration for scavengers.

Hall's other arguments in support of the objective reasonableness of Bet-Air's expectation of privacy are unpersuasive. They can be reduced to the assertion that the dumpster was located within the "commercial curtilage" of Bet-Air's property and that a private garbage collection company collected the garbage.

"The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house. . . ." The concept of curtilage plays a part in determining the reach of the Fourth Amendment's protections. The Supreme Court used the concept of curtilage in Hester v. United States, to distinguish between the area outside a person's house which the Fourth Amendment protects, and the open fields, which are afforded no Fourth Amendment protection. In general, the curtilage is defined as the area around the home which "harbors those intimate activities associated with domestic life and the privacies of the home."

Whether the Fourth Amendment protects privacy interests within the curtilage of a dwelling house depends on four factors: (1) the proximity of the area claimed to be curtilage to the home; (2) the nature of the uses to which the area is put; (3) whether the area is included within an enclosure surrounding the home; and, (4) the steps the resident takes to protect the area from observation. The Supreme Court has not squarely addressed the applicability of the common law concept of curtilage to commercial property. Given the Court's view of the relationship between the Fourth Amendment and commercial premises, however, we have little doubt that were the Court to embrace the so-called "business curtilage" concept, it would, at a minimum, require that the commercial proprietor take affirmative steps to exclude the public. Such a requirement is apparently foreordained through a long line of case beginning with See v. Seattle. In light of Bet-Air's failure to exclude the public from the area immediately surrounding its offices, we refuse to apply the so-called "business curtilage" concept in this case.

* * *

Accordingly, we do not believe that Parks infringed upon any societal values the Fourth Amendment protects when he searched Bet-Air's garbage. Bet- Air did not take sufficient steps to restrict the public's access to its discarded garbage; therefore, its subjective expectation of privacy is not one that society is prepared to accept as objectively reasonable.

* * *

CONCLUSION

We find no error in the district court's denial of the suppression motion and the imposition of sentence, nor do we find any impropriety in the prosecutor's closing statements. Accordingly, Hall's convictions and sentences are affirmed.

AFFIRMED.

94-1691 NEW YORK v. SPENCER

Search and seizure—Vehicle stops—Stop to ask driver whereabouts of suspect.

Ruling below (NY CtApp, 84 N.Y.2d 479, 622 N.Y.2d 483, 56 CrL 1385):

Police officers conducted unreasonable stop in violation of Fourth Amendment when, acting upon victim's suggestion that particular motorist she had just seen would likely know whereabouts of man who she said assaulted her, officers stopped motorist to ask about suspect's whereabouts; plastic bag of marijuana illuminated by officers' flashlights as they queried defendant and firearm seized during later search should have been suppressed at defendant's trial; defendant's convictions of drug and firearms offenses are reversed.

Question presented: Did police officers act reasonably when they stopped automobile solely to ask driver location of armed violent felony suspect, who had been seen in immediate vicinity several minutes earlier, in case in which officer had reasonable cause to believe that suspect's whereabouts were known to driver of automobile?

Petition for certiorari filed 4/17/95, by Charles J. Hynes, Dist. Atty. for Kings Cty., N.Y., Roseann B. MacKechnie, Victor Barall, Anthea Bruffee, and Jonathan Frank, Asst. Dist. Attys., and Valerie DePalma, Legal Asst. to Dist. Atty.

94-1666 FREDERICK v. VIRGIN ISLANDS

Search and seizure—Inevitable discovery doctrine—Impeachment—Jury instructions.

Ruling below (CA 3, 12/16/94, unpublished):

Court affirms, without comment, defendant's convictions of murder and related offenses.

Questions presented: (1) Has "inevitable discovery" rule ended Fourth Amendment's requirement that law enforcement officers procure warrant before conducting search of private home? (2) Did trial court err by allowing prosecution to use evidence, which had been illegally seized and suppressed, on its cross-examination of defendant when that evidence was not brought out by defense on his direct or cross-examination? (3) Is it plain error for trial court to give incomplete jury charge on burden of proof element of affirmative defense of excusable homicide, under Virgin Islands law?

Petition for certiorari filed 4/11/95, by Mark L. Milligan, Gordon C. Rhea, and Alkon, Rhea & Hart, all of Christiansted, St. Croix, V.I.

DUI POLICY MAY RUN INTO DOUBLE JEOPARDY

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Tony Mauro

More and more states are hitting drunken drivers with a one-two legal punch: suspend their licenses immediately, then try them on criminal charges later.

But judges in 18 states have balked at the approach, setting aside the convictions of more than 1,000 defendants - including singer John Denver - on the grounds that the one-two punch amounts to "double jeopardy."

Double jeopardy, barred by the Bill of Rights, refers to double punishment for the same crime.

In some jurisdictions in Idaho and Virginia, police have reportedly stopped confiscating licenses of alleged drunken drivers because some local judges have reversed convictions on double jeopardy grounds.

"You have the crazy situation where it depends on what courtroom you are in whether it's double jeopardy or not," says Fairfax County, Va., Commonwealth's Attorney Robert Horan Jr.

So far, the double jeopardy argument has not been upheld on appeal, but legal experts say the issue may have to be settled by the U.S. Supreme Court.

Lawyers for accused drivers say they are making a valid - even if unpopular - constitutional claim.

"I know it's a hard sell," says Robert Chestney, an Atlanta lawyer who has challenged several convictions on double-jeopardy grounds. "It's a popular notion to punish drunk drivers, even if they're punished twice."

Laws in 38 states allow for the immediate suspension of licenses for up to 90 days following arrest, encouraged in part by a federal law that ties the distribution of highway funds to passage of tougher drunken-driving laws.

The wave of reversals was triggered by a series of seemingly unrelated Supreme Court rulings that restrict the ability of law enforcement officials to seize the assets and property of accused drug offenders. The asset forfeitures were viewed by the court as punishment separate from the criminal proceedings, and now lawyers for accused drivers argue that the suspension of drivers' licenses should be viewed the same way.

"In some courts, convictions are being thrown out 10 and 20 at a time," says Long Beach, Calif. lawyer Lawrence Taylor, who developed the double-jeopardy argument. "It has been courageous for some of these judges to keep the Constitution in mind."

But Fairfax County's Horan says license suspension is aimed at "protecting the safety of the general public. A license is a privilege, not a right, so taking the license is not part of the punishment."

SINGER'S DUI SONG FALLS FLAT FOR OTHERS

Denver Post
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Saturday, July 1, 1995

Howard Pankratz
Denver Post Legal Affairs Writer

A dozen Denver motorists, employing what had been a successful legal argument for singer John Denver, were told yesterday that what worked for the recording star doesn't work for them.

Wading into a national legal debate, Denver County Judge Arthur Fine ruled that the 12 can be prosecuted on drunken-driving charges even though their driving privileges have already been revoked administratively. The judge said that both prosecuting and yanking the license of someone accused of driving drunk does not constitute "double jeopardy" or "double punishment" for the same offense.

Fine, who handles drunken-driving cases, had noticed 12 separate cases in which attorneys asserted the "double jeopardy" claim. He heard the cases in one session, then issued his ruling. With that decision, Fine joined the sizzling debate over whether the loss of a license plus criminal prosecution subjects drivers to unconstitutional double punishment.

The battle gained national media attention in March when Pitkin County Judge Fitzhugh Scott III dismissed a DUI charge against Denver.

The singer's attorneys - Walter Gerash, Todd Thompson and Wally Prugh - argued that revocation of a license is a severe form of punishment in today's society. To have your license yanked and then be criminally prosecuted, they said, amounted to double punishment or double jeopardy.

Scott agreed.

The judge said that revocation of a license has a highly punitive aspect to it. To try Denver criminally would result in a second punishment, which would be unconstitutional, said the judge.

Prosecutors contend that the administrative revocation is remedial, not punitive. It is designed to protect the nation's highways from irresponsible motorists, they say.

Fine noted yesterday that losing a driver's license can have a profound impact. "For the average person the right to drive is of great importance and its loss is disruptive of daily life," he said. But that doesn't amount to "punishment" in the legal sense, he added.

The goal of the administrative revocation law, he said, is to remove dangerous drivers from the road as quickly as possible. "The social interest in providing for safety on the streets and highways is a regulatory purpose unrelated to criminal punishment," wrote Fine. "The admittedly significant detriment to the defendant from civil regulatory action - the "sting' - does not alone establish "punishment.'

"This (license revocation) statute is a stringent regulatory measure," Fine added. "A misstep by a citizen can trigger irreversible damage, unrelated to the outcome of a criminal charge or even if no criminal charge is ever filed."

Fine's decision was hailed by Lawson Willis, the Aspen prosecutor who has taken John Denver to court twice on charges of drinking and driving.

Denver was arrested Aug. 23, 1993, when an officer saw his vehicle weaving down an Aspen street. His blood alcohol level was 0.140, above the legal limit of 0.1. He later pleaded guilty to driving while impaired.

The second case occurred Aug. 21, 1994, after Denver crashed his Porsche into a tree near Aspen. Charges of driving under the influence and careless driving were dismissed by Scott when he determined the criminal case amounted to double jeopardy.

Denver's license was never suspended because a hearing officer determined that the blood drawn from him for testing was not taken within the required two hours.

The prosecutor, Willis, has appealed Scott's decision.

Willis said that Fine's decision follows two important rulings in other states, one by the Maine Supreme Court, the other by the Minnesota Court of Appeals.

Both cases, decided three weeks ago, upheld the right of states to administratively revoke licenses and criminally prosecute drivers.

Willis contends that these two decisions and a myriad of lower court decisions in other states have established a "clear trend" rejecting the double jeopardy argument.

"The courts of magnitude - the appellate courts and the Supreme Courts are not going along with this double jeopardy argument," said Willis. "It is the very isolated cases which are getting all the publicity. And all of these isolated cases - at least to date anyway - are getting reversed."

Wally Prugh, of the Gerash law firm, said many decisions have gone the other way.

In Colorado, Scott of Pitkin County and Judge William Fox of Fremont County have made such rulings, he said. In addition, courts in Alaska, Arizona, Connecticut, Florida, Idaho, Iowa, Kansas, Minnesota, New Jersey, New Mexico, Ohio, South Carolina, Virginia and Washington have said double jeopardy is created by the situation.

DRUNK DRIVERS CLAIM THEY ARE PUNISHED TWICE

The Wall Street Journal

Wednesday, June 21, 1995

Tommy Sangchompuphen
Staff Reporter of The Wall Street Journal

It sounds like a sure way to get the book thrown at you: fail a Breathalyzer test when you're pulled over for drunken driving.

But losing your license after failing a test can actually get you off the hook in some states, where courts have instituted a novel reading of the Constitution's prohibition against double jeopardy. In those states, if a driver's license is automatically suspended after he or she fails a test, judges have ruled that the driver can't face criminal charges too. That, they say, would be two prosecutions for the same crime.

"If the state wants to take a shot at you, it can, but don't do it twice," says Lawrence Taylor, a Long Beach, Calif., lawyer who defends alleged drunken drivers and teaches the double-jeopardy defense to other lawyers.

State governments have been getting around this by calling license suspensions administrative proceedings, Mr. Taylor says. But "that's a double punishment no matter what it's called."

So far, trial courts in 18 states have ruled for the double-jeopardy argument in drunken-driving cases. But the question may ultimately be settled by the Supreme Court because states are appealing and, so far, winning their appeals, lawyers say. "Right now it seems as though there are a number of courts which have decided on both sides of the issue," says Jesselyn McCurdy, staff attorney for the National Traffic Law Center at the American Prosecutors Research Institute in Alexandria, Va.

The highest courts in five states -- New Mexico, Maine, Hawaii, Vermont and Louisiana -- have upheld the states' right to suspend a driver's license and subsequently prosecute the driver for drunk driving.

In the Maine case, the defendant, John Savard, a 23-year-old office manager for a real-estate appraisal company, had his license suspended after failing a Breathalyzer test. Mr. Savard's lawyer tried to have criminal charges dismissed, saying that any criminal punishment would amount to double jeopardy. The trial court agreed and threw out the charges against Mr. Savard. But the Maine Supreme Judicial Court overruled the trial court earlier this month.

If convicted, Mr. Savard, a first-time offender, faces a maximum fine of $500 and some community-service work. (Criminal penalties for first-time offenders who drive under the influence of alcohol or with a blood-alcohol level of 0.10% -- or 0.08% in some states -- typically include fines, jail time or probation.)

Meanwhile, the Minnesota Court of Appeals and the Arizona Court of Appeals last week reversed trial-court decisions that said license suspensions are "punishment" and violate double-jeopardy protection. The Minnesota appellate court ruled that license suspensions are remedial and serve to protect drivers.

The Fifth Amendment's double-jeopardy clause was designed to give the state one --and only one -- shot at an accused criminal, says Rogers Smith, who teaches constitutional law at Yale University. Otherwise, exonerated defendants would live in continual fear of being prosecuted again.

To show that double jeopardy has been violated in drunken-driving cases, it is necessary to show that "the government has in two separate proceedings imposed two separate punishments," says John Junker of the University of Washington School of Law. The issue of double jeopardy, he says, can be avoided if both the civil and criminal proceedings take place at the same time.

In all 50 states, statutes provide for the suspension of the license of a driver who refuses to take a breath test, in addition to possible subsequent criminal sanctions. In 37 states and the District of Columbia, laws call for the immediate suspension or revocation of a license when a driver fails a breath test, in addition to criminal proceedings.

Some states whose trial courts have ruled in favor of the double-jeopardy defense are temporarily modifying their laws to avoid losing more cases while the decisions are being appealed. Earlier this month, the Connecticut Legislature voted only to suspend the licenses of first-time offenders and to seek criminal prosecution only for repeat offenders or for impaired drivers who injure or kill other people, says John Bailey, chief state's attorney for Connecticut. Other states have made similar moves.

Mr. Taylor and other defense lawyers point to two precedents that lend credence to this new defense tactic: the Supreme Court's decision in Department of Revenue of Montana vs. Kurth Ranch and a recent decision by the Ninth U.S. Circuit Court of Appeals in San Francisco.

In the 1994 Supreme Court case, the justices ruled that prosecuting an individual for selling marijuana and then civilly imposing a "marijuana tax" on the individual's property under the state's Dangerous Drug Tax Act constituted double jeopardy.

A Ninth Circuit appeals court panel, meanwhile, ruled last September that the federal government's practice of combining civil property forfeiture proceedings and criminal sanctions in drug cases violated the double-jeopardy clause.

But some legal experts contend that drunken-driving cases are different.

"My own instinct is that usually a license revocation is a remedial proceeding and not criminal punishment and does not constitute double jeopardy," says University of Chicago Law School Professor Stephen Schulhofer.